85-926

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CHRISTIAN BROADCASTING NETWORK, INC.,
Petitioner,

v.

THE COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Copyright Royalty Tribunal ("CRT") is responsible for distributing tens of millions of dollars each year in royalty fees to coyright owners whose works are subject to compulsory licenses. If there is a controversy among copyright owners as to division of these fees, it is the statutory responsibility of the CRT to conduct proceedings to determine the entitlement of claimants to share in these royalties. Based on the record of these proceedings, the CRT allocates royalties among those claimants who have proven such entitlement. The District of Columbia Circuit, in the decision below, refused to disturb three separate CRT cable television distribution decisions including one decision which, based solely on a private settlement, had given 99% of 45 million dollars in royalties to parties who had *not* been required to prove entitlement. The lower court's decision is in direct conflict with a May, 1985, decision of the Second Circuit Court of Appeals which held that all claimant groups *were* required to prove entitlement. Moreover, despite the CRT's blatant anti-religious reasoning in earlier decisions, the circuit court did not carefully scrutinize the decisions before it here so as to ensure the agency had purged its determinations of unconstitutional discrimination. The panel apparently believed that the CRT's omission of explicit anti-religious language, in and of itself, removed any taint of discrimination.

The questions presented are:

1. Does the Copyright Royalty Tribunal's decision to allocate cable television compulsory license royalties to claimants who do not prove any entitlement to such funds violate the Copyright Act of 1976, 17 U.S.C.

§ 111(d), and the Due Process Clause of the Constitution?

2. Did the court below give sufficiently exacting scrutiny to the CRT's decisions so as to ensure that the agency had purged unconstitutional religious discrimination from those decisions?

LIST OF PARTIES

The parties in the consolidated cases 84-1230, *et al.* and 84-1519, *et al.* decided by the Court of Appeals were petitioner/intervenors The Christian Broadcasting Network, Inc., National Association of Broadcasters, Heritage Village Church and Missionary Fellowship, Inc. (the PTL Television Network), Old Time Gospel Hour, Motion Picture Association of America, Inc., its member companies, and other companies involved in the production of distribution of movies and syndicated series, Public Broadcasting Service,[1] Multimedia Entertainment, Inc., Major League Baseball, the National Basketball Association, the National Hockey League, the North American Soccer League, the National Collegiate Athletic Association, American Society of Composers, Authors and Publishers, Broadcast Music, Inc., SESAC, Inc., Canadian Broadcasting Corporation, CTV Television Network, Ltd., Glenn Warren Productions, Ltd., Performing Rights Organizations of Canada, Ltd., T.V. Ontario, and National Public Radio. The Copyright Royalty Tribunal was respondent in all actions. Intervenors in 84-1519, *et al.* were the National Association of Broadcasters, Turner Broadcasting System, Inc. and SIN, Inc. Superstation, Inc. intervened in 84-1230, *et al.*

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[1] Other parties comprising the public television claimant group are: Southern Educational Communications Association, Children's Television Workshop, Family Communications, Inc., Ontario Educational Television Authority, Time-Life Films, Inc., Children's Television International, Agency for Instructional Television, Janus Films, Inc., German Educational Television Network, Pacific Mountain Network, Center for Television in the Humanities, Maryland Instructional Television, Learning in Focus, Inc., Metropolitan Opera Association, Public Television Playhouse, National Review, Inc., Amagin, Inc. and the licensees of public television stations throughout the United States.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, The Christian Broadcasting Network, Inc. ("CBN"), petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the order filed August 20, 1985, jointly in *National Association of Broadcasters* v. *Copyright Royalty Tribunal,* D.C. Cir. Nos. 84-1230 *et al.,* and in *The Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal,* D.C. Cir. Nos. 84-1519 *et al.,* affirming the final determinations of the Copyright Royalty Tribunal as to distributions of copyright royalties for cable retransmission of copyrighted royalties for 1979, 1980 and 1982.

OPINIONS BELOW

The opinion and order of the Court of Appeals for the District of Columbia Circuit is reported at 772 F.2d 922 (D.C. Cir. 1985) and is reproduced in the Appendix filed herewith ("App.") at A.

The notice of final determination by the CRT as to the distribution of royalties for the year 1979, making a token award to CBN and other "Devotional Claimants," is published at 49 Fed. Reg. 20048 (May 11, 1984) and is reproduced at App. F.

The notice of the CRT's final determination for the year 1980, making the same token award of royalties to the "Devotional Claimants," is published at 49 Fed. Reg. 28090 (July 10, 1984) and is reproduced at App. E.

The CRT's final determination for the year 1982, making only a slightly larger token award to CBN and other "Devotional Claimants," is published at 49 Fed. Reg. 37653 (September 25, 1984) and is reproduced at App. D.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on August 30, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent portions of Sections 111 and 803 of the Copyright Act of 1976, 17 U.S.C. §§ 111, 803, are reproduced at App. G.

STATEMENT OF THE CASE

The Copyright Act of 1976 (the "Act") created a compulsory license which permits cable television systems to retransmit certain copyrighted programs broadcast by "distant" television stations. In return for a license to retransmit these copyrighted programs, cable systems pay annual royalty fees set by the Copyright Royalty Tribunal ("CRT"). Each year the CRT must allocate and distribute tens of millions of dollars in royalty fees to copyright owners whose works have been carried on distant signals.[2]

The Copyright Act does not specify in any detail the method by which the CRT is to allocate royalty fees. Indeed, the Second Circuit Court of Appeals has described the CRT as a "bureaucratic Garden of Eden, . . . blessed with all the authority and discretion any governmental agency could ask for . . . ." *Acemla* v. *Copyright Royalty Tribunal*, 763 F.2d 101, 103 (2d Cir. 1985) (*"Acemla"*). Nonetheless, there are *some* rules. Section 111(d)(5)(A) of the Act permits copyright owners to "agree among themselves as to the proportionate division of compulsory license fees *among* them . . . ." (emphasis supplied). 17 U.S.C. 111(d)(5)(A). But if settlement cannot be reached among all claimants, there is no provision allowing any group of claimants to itself determine its total share of royalties vis-a-vis other claimants not party to the settlement. Rather, the CRT is required to "conduct a proceeding to determine the distribution of royalty fees" among all claimants. 17 U.S.C. § 111(d)(5)(B).

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[2] "Distant signals" are defined by the Federal Communications Commission in 47 C.F.R. Part 76.

Petitioner CBN is the producer of a variety of copyrighted programming which were the subject of distant signal cable carriage in 1979, 1980 and 1982. CBN's most widely-known program is "The 700 Club," a daily 90-minute magazine format program hosted by M. G. "Pat" Robertson. CBN and other religious programmers produce scores of programs—ranging from traditional church services, to magazine formatted programs, to talk-variety shows, to gospel music shows, soap operas and animated programs. Many of these programs are retransmitted on "distant signals" by cable systems.

CBN has participated in the Tribunal's royalty payment proceedings since their inception in 1978. The decision below reviewed the CRT distribution proceedings for 1979, 1980, and 1982.

In its first attempt to distribute 1979 royalties, the CRT awarded absolutely no royalties to CBN or to any other owner of copyright in syndicated religious programming. 47 Fed. Reg. 9879, 9890 (March 8, 1982). In refusing to make an award, the CRT relied on a supposed fundamental distinction between the producers of religious programs and certain other copyright owners: the religious programmers *buy* time on television stations to broadcast some of their programs, which programs distributed by other program syndicators are typically *sold* or bartered to stations. 47 Fed. Reg. at 9896. CBN explained that it paid broadcasters because it had made a conscious decision to avoid commercial insertions in its religious programming; its policy of purchasing time was therefore *not* an external indication of market worthlessness. The

Tribunal, however, insisted that the Devotional Claimants' payments were a "special factor" which somehow proved that their programs were worthless and warranted a zero award. 47 Fed. Reg. at 9896. The Tribunal also postulated, without supporting evidence, a second "special factor": because religious programmers rely on viewer contributions, they supposedly benefit from distant signal retransmissions.

In its first 1980 distribution decision, the CRT also refused to award CBN or any other religious programmer any royalties, once again relying on the "special factor" concept. 48 Fed. Reg. 9552 (March 7, 1983). The CRT attempted to justify its decision to award the Public Broadcasting System ("PBS")—which is equally subject to the "special factors"—a full 5.25% of the funds by stating:

> The devotional claimants conduct *a Christian ministry. Even their more entertainment types of program formats are designed to provide a Christian ministry.* In contrast public broadcasting is a programming institution supported by a broadly based coalition of government, corporations, foundations, and individuals which presents a wide range of programming much of which is not available on commercial television.

48 Fed. Reg. at 9568 (emphasis supplied).

The CRT's first 1979 decision was reversed and remanded by the District of Columbia Circuit. *The Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal,* 720 F.2d 1295 (D.C. Cir. 1983). App. C. The circuit court thereafter vacated and remanded the Tribunal's original 1980 decision. App. B.

After remand, the CRT made a token award to religious programmers for 1979 of .35%, even though religious programs constituted 7% of all programming subject to compulsory licensing. The court of appeals had criticized the CRT's original decision because it displayed an "unexplained vengeance" against religious programmers. *Id.* at 1311, App. C at 69a. The CRT's sole response was religious slur: noting that it could not "leave unanswered" the court of appeal's opinion, the CRT cited Romans 12:19 [3] and remarked that it left vengeance "to other authority." 49 Fed. Reg. 20048, 20050 (May 11, 1984), App. F. at 123a. In making its minimal award to religious programmers, the CRT explicitly relied, once again, on the supposed "special factors." *Id.* at 20049, 20050, App. F. at 118a, 121a-122a.

In the remand proceedings for the 1980 award, the CRT, relying on its 1979 findings and thus the "special factors," made the same token award as in 1979—.35%. 49 Fed. Reg. 28090, 28091 (July 10, 1984), App. E at 107a.

On April 30, 1984, the CRT issued an Order requiring claimants to present evidence in the *1982* cable royalty distribution proceeding. CBN and other religious claimants placed into evidence their direct case consisting of a witness list, summary of testimony and seven exhibits. With the exception of the Public Broadcasting Service, *no other claimant or group of claimants introduced into the record even a scintilla of evidence as to the basis of any award to it for 1982.*

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[3] "Dearly beloved, avenge not yourselves, but rather give place unto wrath; for it is written, vengeance is mine; I will repay, saith the Lord."

Rather, these claimants reported they had settled among themselves and took the position that this settlement somehow made proof as to their own entitlement to royalty fees unnecessary.

On September 20, 1984, the Tribunal announced its distribution awards for 1982. 49 Fed. Reg. 37653 (September 25, 1984), App. D. The CRT finally admitted there was not—and never had been—any evidentiary basis for the "special factors,' but refused to modify its 1979 and 1980 remand decisions accordingly. *Id.* at 37654, App. D at 91a-92a. As for the 1982 award, the CRT maintained that it could make an award of 99% of the 45 million dollars in royalty funds to the settling parties—even though these parties had presented no direct evidence as to their own entitlement—with the following "rationale":

> All Phase I parties, other than Devotional, in a series of voluntary agreements *determined* the Phase I awards. Since these agreements did not include the Devotional Claimants, the only controversy to be determined by the Tribunal was what award, if any, to make to the Devotional Claimants.

49 Fed. Reg. at 37654, App. D. at 90a (emphasis added).

The appeals of the 1979, 1980 and 1982 cases, which were all before the lower court pursuant to 17 U.S.C. § 803, were consolidated for argument. On August 30, 1985, the panel issued a decision jointly in the 1979, 1980 and 1982 cases in which it concluded that "for better or worse" Congress had entrusted the CRT with the responsibility for dividing up the royalties, and

that the awards would be left undisturbed. *The National Association of Broadcasters* v. *Copyright Royalty Tribunal,* 772 F.2d 922 (D.C. Cir. 1985) ("*NAB* v. *CRT*"), App. A.

Judge Starr's opinion, in which Judges Edwards and Scalia joined, rejected CBN's argument that absent total agreement, the CRT had no authority to distribute royalty funds to settling parties who had not proved entitlement, nor to allow such parties to "determine" their own award. The lower court did not address the argument that it was a violation of due process to apply different standards of proof of entitlement to competing claimants for funds. Nor did the panel attempt to distinguish the Second Circuit Court of Appeal's conflicting decision in *Acemla.* As for CBN's argument that the CRT's minimal awards reflected hostility to CBN's religious views, the panel held there was no language indicating such hostility in the CRT's determination of 1980 royalties *after* remand. The lower court failed to address the CRT's sarcastic reference to Romans 12:19—and apparently found irrelevant the CRT's failure to repudiate its views as to CBN's "Christian ministry"—in holding there was no evidence of religious discrimination. The lower court gave no real attention to the CRT's continuing discriminatory use of the "special factors" solely against religious programmers in the 1979 and 1980 remand decisions.

REASONS FOR GRANTING THE WRIT

1. The Lower Court's Ruling That The Copyright Royalty Tribunal Had Authority To Allocate Royalty Funds To Claimants Who Had Not Proved Their Entitlement Should Re Reviewed By This Court Because That Ruling—

(a) Is Inconsistent With The Result Reached By The Second Circuit;

The result reached below is in direct conflict with the decision reached three months earlier by the Second Circuit in *Acemla* v. *Copyright Royalty Tribunal*, 763 F.2d 101 (2d Cir. 1985).

In *Acemla*, the Second Circuit held that the CRT acted contrary to the requirements of Section 116 of the Copyright Act when it distributed jukebox royalties to settling claimants who had not proved entitlement. The Second Circuit held that an agreement is not sufficient substitute for proof. "[W]hen the [claimants] fail to agree on a distribution, *the same standards of proof of entitlement must be applied to all the competing* [*claimants*], and in compliance with the statute, the CRT must state the criteria, facts, and specific reasons underlying its distribution." *Id.* at 109.

In direct contrast to *Acemla*, the lower court here held that it was *not* error for the CRT to rely on the terms of an agreement to distribue royalties to parties who had not proved entitlement. *The National Association of Broadcasters* v. *Copyright Royalty Tribunal*, 772 F.2d 922, 939 (D.C. Cir. 1985) App. A at 36a. The panel did not even comment on—much less justify—the fundamental unfairness of a one-sided procedure in which only the religious programmers were required to prove their case, with the remaining 44 million dollars in royalties simply *given* to settling

parties who had made no showing of entitlement. The lower court did not even attempt to square its holding with the explicit requirement in the Copyright Act that the CRT "*shall* conduct a proceeding to determine the distribution of royalty fees" if there is a controversy among claimants. 17 U.S.C. § 111(d)(5)(B) (emphasis supplied). The lower court made no attempt whatsover to distinguish *Acemla*—or even to claim *Acemla* was wrong—although the Second Circuit's opinion had been brought to its attention by the parties.

The lower court opined that a policy preference for "settlements" was somehow controlling: the panel apparently believed this policy preference made statutory analysis unnecessary. The panel did not explain, however, how this policy preference could override the Second Circuit's fundamental concern about a procedure that applies different standards of proof to different claimants.

The lower courts, the CRT, and the parties to its proceedings, deserve guidance as to whether *Acemla* or the decision below is good law. Only review by this Court can provide such guidance.

(b) Involves An Important Issue Of Federal Law That Ought To Be Resolved By This Court.

The conflict between the Second Circuit and the lower court is not merely academic: it is of utmost importance to the owners of copyrights in programs retransmitted on distant cable signals, and is critical for the fair administration of the CRT's allocative functions.

The lower court's decision cavalierly dismissed the explicit requirements for a fair hearing in Section 111 of the Copyright Act because of a policy preference for settlements. The panel stated that it would make it too easy for a non-settling party to "upset the settlement apple cart" if a hearing were necessary in the absence of full settlement. *NAB* v. *CRT*, 772 F.2d at 939, App. A at 36a. But such "policy" considerations cannot—and should not—override the *explicit* requirements of the Copyright Act. As the Second Circuit held in *Acemla*, Congress may have given the CRT "all the authority and discretion any governmental agency can ask for . . . ," but there are *some* rules. *Acemla*, *supra* at 103. The CRT must respect the mandate of the Copyright Act, and the lower appeals courts should ensure such compliance.

In any case, even the lower court's "policy" rationale is fundamentally defective. The one-sided procedure condoned by the panel—in disregard of clear statutory language—allows settling parties to coerce a smaller claimant into an unfair settlement: otherwise, the smaller claimant will need to *prove* its case with the large settling parties simply *given* the remaining funds.

This is inherently coercive and unfair. Assume, for example, there are three claimants and two settle. They join forces to oppose the remaining claimant hoping to defeat its entire claim. The worst that can happen to them is that the third party will establish its entitlement and the settling parties would have to share the balance. By the mere act of joining forces, they have totally escaped both the risk of nonpersuasion and the risk of failure of proof. In the process, the

merits of their particular entitlements become wholly irrelevant. By simply attacking successfully the one remaining claimant who must prove its case, the settling parties may reap a windfall. This, the Act squarely proscribes.

Moreover, the lower court's policy justification is irrational. If there are two groups of settling claimants, which group should be required to prove its case? Does the CRT simply give the "larger" group—however that is determined—any royalties to which the "smaller" group cannot prove entitlement? Why not make the "larger" group prove *its* entitlement and give the remainder to the "smaller' group? There are simply no rational lines to be drawn.

Perhaps more significantly, the lower court simply ignored the obvious due process problems inherent in a one-sided hearing where different claimants had different burdens of proof. The due process problems in a procedure where only certain parties are required to present evidence—and only certain parties have their claims subjected to cross-examination—are so basic and fundamental that no "concern" about settlements could override them. *See Greene* v. *McElroy,* 360 U.S. 474, 496-497 (1959) (right to cross-examination has ancient roots and must be zealously protected from erosion); Brylawski, *The Copyright Royalty Tribunal,* 24 U.C.L.A. L.Rev. 1265, 1267 (1977) (commenting on "manifest unfairness" of requiring only certain copyright proprietors to prove their claims); *cf. Mayberry* v. *Pennsylvania,* 400 U.S. 455, 469 (1971) ("the appearance of evenhanded justice . . . is at the core of due process"). The need for due process is especially compelling here, where the government has "taken"

the intellectual property of CBN by grant of a compulsory license to cable operators, and the CRT is charged with distributing funds to compensate for that "taking."

Apparently, the District of Columbia Circuit, exhausted by the ineffectiveness of its repeated attempts to get the CRT to conduct rational allocations, has simply given up. In 1982, the circuit court remarked that the CRT explained its conclusions "with less than ideal clarity" and said it "expect[ed] the quality of the Tribunal's decisionmaking to improve with experience." *National Cable Television Association* v. *Copyright Royalty Tribunal,* 689 F.2d 1077, 1091 (D.C. 1982). In 1983, the District of Columbia Circuit admonished the CRT not to abdicate its responsibility. *The Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal,* 720 F.2d 1295, 1319 (D.C. Cir. 1983), App. C at 87a. At that time, the circuit court repeated its criticisms of the CRT and said: "The time for improvement is now." *Id.* at 1307, App. C at 62a. By 1985, however, the lower court abandoned its efforts to improve the quality of CRT decisions, and affirmed the agency in *all* respects. It refused even to enforce the Copyright Act's explicit requirement for a hearing, lamenting that "for better or worse" Congress had given the allocative task to the CRT. *NAB* v. *CRT,* 772 F.2d at 940, App. A at 37a.

The CRT collects and allocates huge sums in royalties from cable operators. For 1979, the CRT distributed over 24 million dollars in royalties; by 1982, there was over 45 million dollars to be allocated; and for 1983, there remains more than 74 million dollars to be divided. This money is designed to compensate

a large group of owners of copyrighted programs: in 1983, for example, almost 700 parties made claims for funds because their programs were retransmitted on cable systems under a compulsory license. The financial position of these claimants is significantly affected by the CRT's decisions and procedures. The lower court's decision is an abdication of its responsibility to ensure a fair allocation procedure for this huge sum of royalties. This Court should review that decision to ensure the integrity of the administrative process at the CRT.

2. The Lower Court's Failure To Rigorously Scrutinize The CRT's Decisions Despite That Agency's Past Overt Religious Discrimination Should Be Reviewed Because It Involves An Important Issue Of Constitutional Law That Ought To Be Resolved By This Court

In its original 1980 determination, the CRT improperly distinguished between awards to PBS and those to the religious programmers on the basis of the *content* of their respective programs: because the religious programmers conducted "Christian ministries" it was somehow appropriate to give them no royalties. 48 Fed. Reg. at 9563. Although the CRT later made token awards to religious programmers, it never repudiated its anti-religious views and it continued to rely on discriminatory criteria.

The CRT's original 1980 determination offered a remarkable "justification" for its decision to award PBS money while denying CBN and other religious claimants any award:

> The devotional claimants conduct *a Christian ministry. Even their more entertainment types of program formats are designed to provide a Christian*

> *ministry*. In contrast public broadcasting is a programming institution supported by a broadly based coalition of government, corporations, foundations, and individuals which presents a wide range of programming much of which is not available on commercial television.

48 Fed. Reg. at 9568 (emphasis supplied).

The lower court did not deny that this content-based distinction between PBS and religious programmers violated the First Amendment. Indeed, it is difficult to conceive of a more flagrant and noxious violation of the firmly established principle that the Government violates the First Amendment when it excludes parties from benefits it administers based on their religious views. *See, e.g., Thomas* v. *Review Board of Indiana Employment Security Division,* 450 U.S. 707 (1981).

Instead, the lower court apparently believed that this religious discrimination had been purged from CRT's remand decisions merely because the remand decisions themselves contained no explicit anti-religious language. How the CRT eliminated unconstiutional discrimination from its decisions is far from evident, however.

The panel did not subject the CRT's later decisions to exacting scrutiny and failed to analyze the Tribunal's reasons and explanations to ensure the CRT's own determinations did not continue to be influenced by religious discrimination. Rather, the lower court formulated its own *post hoc* rationale to show that the token award 1979 and 1980 awards after remand—0.35%—could be placed within a "zone of reasonableness." *NAB* v. *CRT,* 772 F.2d at 930, App. A. at 17a-18a.

The panel conceded that the CRT itself had not explained its minimal award but had instead relied on "short-hand and toss-away, conclusory sentences." *NAB* v. *CRT,* 772 F.2d at 930 n.10, App. A at 18a n.10. Yet the lower court did not—and could not—explain how it could be certain the CRT had purged itself of unconstitutional discrimination when the CRT had not *explained* its reasoning.

Moreover, the lower court disregarded specific evidence that the CRT was still biased against religious programmers. The panel simply ignored the CRT's sarcastic reference to the Bible and tried to pretend that the CRT had not relied on the discriminatory "special factors." The CRT's reliance on the "special factors," however, it crystal clear. 49 Fed. Reg. at 20049, and 20050, App. F at 118a, 121a-122a. Equally clear is their discriminatory impact. These factors were only applied to reduce the awards to religious programmers, and were *not* applied to *similarly* situated secular programmers such as PBS. Moreover, these factors serve to penalize religious program producers solely because—in their exercise of First Amendment rights—they chose not to disrupt devotional programming with obtrusive pitches for commercial products.

The lower court's failure to subject the CRT's decisions to exacting scrutiny so as to ensure the removal of any "taints" of unconstitutional motivation is inconsistent with the dictates of the First Amendment. This Court has emphasized that governmental regulation of speech on the basis of its content requires "the most exacting scrutiny." *Widmar* v. *Vincent,* 454 U.S. 263, 276 (1981). It is fundamental that "[g]overnment in our democracy, state and national, must be

neutral in matters of religious theory, doctrine and practice. . . . It may not be hostile to any religion." *Epperson* v. *Arkansas,* 393 U.S. 97, 103-104 (1968). This Court has not been reluctant to strike down governmental decisions because they were intended to penalize First Amendment rights. *See Minneapolis Star & Tribune* v. *Minnesota Commissioner of Revenue,* 460 U.S. 575, 580 (1983); *Grosjean* v. *American Press Co., Inc.,* 297 U.S. 233 (1936); L. Tribe, *American Constitutional Law,* 591-592 (1978).

The court should review the panel's decision to establish authoritatively the standard by which courts should judge whether a federal agency has purged its decisions of past religious discrimination, and whether the CRT's elimination of explicit anti-religous language from its most recent decisions is sufficient to eliminate the taint of unconstitutional action. This would be consistent with the Court's treatment of school desegregation, where this Court has required concrete proof of actions that remove "all vestiges" of discrimination in order to ensure the removal of any "'taint' of unconstitutional motivation. *See e.g. Swann* v. *Charlotte-Mecklenburg Board of Educ.,* 402 U.S. 1, 15 (1971); *Green* v. *County School Board of New Kent County, Virginia,* 391 U.S. 430, 437-38 n.4 (1968). The standard of proof for proving that an agency has removed the taints of religious discrimination should not be lower. In any case, this Court, and not a court of appeals, should establish the standards a federal agency must meet to show it has eliminated the effects of such past First Amendment violations.

CONCLUSION

This petition raises two important constitutional issues requiring review by this Court. By hearing this case the Court can ensure the CRT will pay proper attention to due process and procedural rights in future proceedings. Furthermore, review will ensure that improper religious discrimination is purged from the CRT's actions. In view of the growing role of the CRT and recent controversy surrounding that agency, grant of this petition is appropriate.

Respectfully submitted,

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November 27, 1985

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1984

No. 84-1230

THE CHRISTIAN BROADCASTING NETWORK, INC.,
Petitioner

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent

TURNER BROADCASTING SYSTEM, INC.,
MULT'MEDIA ENTERTAINMENT, INC.,
OLD-TIME GOSPEL HOUR,
CANADIAN BROADCASTING CORPORATION, *et al.*,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*,
NATIONAL ASSOCIATION OF BROADCASTERS,
Intervenors

AND CONSOLIDATED CASE NOS. 84-1525, 84-1529,
84-1530, 84-1531, 84-1535 and 84-1526

ORDER

[Filed August 30, 1985. George A. Fisher, Clerk]

It is ORDERED, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For The Court

George A. Fisher
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1984

No. 84-1519

THE CHRISTIAN BROADCASTING NETWORK, INC.,
Petitioner

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent

TURNER BROADCASTING SYSTEM, INC.,
MULTIMEDIA ENTERTAINMENT, INC.,
OLD-TIME GOSPEL HOUR,
CANADIAN BROADCASTING CORPORATION, *et al.*,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., *et al.*,
NATIONAL ASSOCIATION OF BROADCASTERS,
Intervenors

AND CONSOLIDATED CASE NOS. 84-1525, 84-1529,
84-1530, 84-1531, 84-1535 and 84-1526

ORDER

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For The Court

George A. Fisher
Clerk

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-1230

THE NATIONAL ASSOCIATION OF BROADCASTERS,
PETITIONER

v.

COPYRIGHT ROYALTY TRIBUNAL, RESPONDENT

MULTIMEDIA ENTERTAINMENT, INC.,
OLD-TIME GOSPEL HOUR,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al.,
SUPERSTATION, INC., INTERVENORS

And Consolidated Case Nos. 84-1232,
84-1233, 84-1234, 84-1238, 84-1396, 84-1398,
84-1399, 84-1400 and 84-1401

Petitions For Review of an Order of the
Copyright Royalty Tribunal

No. 84-1519

THE CHRISTIAN BROADCASTING NETWORK, INC.,
PETITIONER

v.

COPYRIGHT ROYALTY TRIBUNAL, RESPONDENT

TURNER BROADCASTING SYSTEM, INC.,
MULTIMEDIA ENTERTAINMENT, INC.,
OLD-TIME GOSPEL HOUR, INC.,
CANADIAN BROADCASTING CORPORATION, et al.,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., et al.,
NATIONAL ASSOCIATION OF BROADCASTERS, INTERVENORS

And Consolidated Case Nos. 84-1525,
84-1526, 84-1529, 84-1530, 84-1531 and 84-1535

Petitions For Review of an Order of the
Copyright Royalty Tribunal

Argued May 6, 1985

Decided August 30, 1985

Victor E. Ferrall, Jr., with whom *John I. Stewart, Jr.*, *David H. Solomon*, *Henry L. Baumann* and *Michael D. Berg* were on the brief for petitioner/intervenor, National Association of Broadcasters, in Nos. 84-1230, et al.

W. Thad Adams, III, with whom *John H. Midlen, Jr.* was on the joint brief for petitioners/intervenors, PTL

Television Network and Old Time Gospel Hour, in Nos. 84-1230, et al.

Arthur Scheiner, with whom *Dennis Lane* and *Richard H. Waysdorf* were on the brief for petitioners/intervenors, Motion Picture Association of America, Inc., et al., in Nos. 84-1230, et al.

I. Fred Koenigsberg, with whom *Bernard Korman* for American Society of Composers, Authors and Publishers, et al. and *Charles T. Duncan*, *Michael W. Faber*, *Lisa Holland Powell* for Broadcast Music, Inc. were on the joint brief, for petitioners/intervenors, Music Claimants, in Nos. 84-1230, et al.

Grover C. Cooper, *Clifford M. Harrington* and *Barry Gottfried* were on the brief for petitioner/intervenor, The Christian Broadcasting Network, Inc., in Nos. 84-1230, et al.

David H. Lloyd, *Robert Alan Garrett* for Major League Baseball; *Philip R. Hochberg* for National Basketball Association, et al. and *Judith Jurin Semo* for National Collegiate Athletic Association were on the joint brief for petitioners/intervenors, joint Sports Claimants, in Nos. 84-1230, et al.

Gene A. Bechtel, *Lawrence A. Horn* and *Jacqueline Weiss*, were on the brief for petitioner/intervenor, Public Broadcasting Service, in Nos. 84-1230, et al. and Nos. 84-1519, et al.

Clifford M. Harrington, with whom *Grover C. Cooper* and *Barry H. Gottfried* for The Christian Broadcasting Network, Inc. and *W. Thad Adams, III* and *John H. Midlen* for PTL Television Network and Old-Time Gospel Hour were on the joint brief for petitioners/intervenors in Nos. 84-1519, et al.

Arnold P. Lutzker, with whom *Carolyn A. Wimbly* were on the briefs for intervenor, Multimedia Entertainment, Inc., in Nos. 84-1230, et al. and Nos. 84-1519, et al.

Dennis Lane, with whom *Arthur Scheiner*, *Robert A. Garrett*, *Jamie S. Gorelick*, *Charles T. Duncan*, *Michael W. Faber* and *Bernard Korman* were on the joint brief for petitioners/intervenors, Motion Picture Association, Inc., et al. *David H. Lloyd Hochberg* also entered appearances for petitioners, Major League Baseball, et al., in Nos. 84-1519, et al.

Douglas G. Thompson, Jr. was on the brief for petitioners/interevnors, Canadian Broadcasting Corporation, et al., in Nos. 84-1519, et al. and Nos. 84-1230, et al.

William G. Cole, Attorney, Department of Justice, with whom *Richard K. Willard*, Acting Assistant Attorney General, and *John F. Cordes*, Attorney, Department of Justice, were on the brief for respondent, Copyright Royalty Tribunal, in Nos. 84-1230, et al. *Mark W. Pennak* and *William Kanter*, Attorneys, Department of Justice, also entered appearances for respondent, Copyright Royalty Tribunal, in Nos. 84-1230, et al.

Marilyn S. G. Urwitz, Attorney, Department of Justice, with whom *Richard K. Willard*, Acting Assistant Attorney General, and *William Kanter*, Attorney, Department of Justice were on the brief for respondent, Copyright Royalty Tribunal, in Nos. 84-1519, et al.

Jamie S. Gorelick was on the brief for intervenor/petitioner, National Public Radio, in Nos. 84-1230, et al.

Peter H. Feinberg entered an appearance for intervenor, Superstation, Inc., in Nos. 84-1230, et al. and intervenor, Turner Broadcasting System, Inc., in Nos. 84-1519, et al.

Victor E. Ferrall, Jr., *John I. Stewart*, *David H. Solomon*, *Henry L. Baumann* and *Michael D. Berg* entered appearances for intervenor, National Association of Broadcasters, in Nos. 84-1519, et al.

Meredith S. Senter, Jr. and *Edwina E. Dowell* entered appearances for intervenor, SIN, Inc., in Nos. 84-1519, et al.

Before: EDWARDS, SCALIA, and STARR, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* STARR.

STARR, *Circuit Judge*: These two cases—one consisting of ten consolidated petitions for review, *National Ass'n of Broadcasters v. Copyright Royalty Tribunal*, C.A. Nos. 84-1230 et al., the other of seven consolidated petitions, *Christian Broadcasting Network, Inc. v. Copyright Royalty Tribunal*, C.A. Nos. 84-1519 et al.[1]—return us once again to the increasingly familiar terrain of copyright royalty awards made by the Copyright Royalty Tribunal ("CRT" or "Tribunal"), a government entity established by the 1976 Copyright Act, 17 U.S.C. §§ 101-810 (1982). These cases represent the court's third foray in as many years into this hotly contested territory, characterized by lively competition for the ever increasing annual cache of royalty dollars for cable retransmission of copyrighted programs. For the reasons that follow, we uphold the decisions under challenge and accordingly deny the petitions for review.

I. BACKGROUND

In view of our two prior decisions in appeals from royalty-distribution determinations by the Tribunal, *see National Ass'n of Broadcasters (NAB) v. CRT*, 675 F.2d 367 (D.C. Cir. 1982) (reviewing the Tribunal's first distribution determination, for calendar year 1978); *Christian Broadcasting Network, Inc. (CBN) v. CRT*, 720 F.2d 1245 (D.C. Cir. 1983) (reviewing the CRT's second annual distribution, for calendar year 1979), it would serve little purpose to rehearse in detail the history of the establishment and operation of the Tribunal and the Roy-

[1] Citations to briefs and Joint Appendix (J.A.) that are made in parts II and III of this opinion refer to briefs and the Joint Appendix filed in C.A. Nos. 84-1230, et al.; citations in part IV of this opinion to briefs and the Joint Appendix refer to briefs and the Joint Appendix filed in C.A. Nos. 84-1519, et al.

alty Fund. Suffice it to say that in determining the manner in which owners of copyrighted programs would be compensated for cable retransmission of their programming, Congress elected to require cable operators periodically to pay royalties into a central fund, from which the Tribunal distributes the allocated amounts to copyright owners-claimants in annual proceedings. The Copyright Act contemplates that claimants may settle their respective claims,[2] but in each of the first five distributions to date a controversy has emerged requiring CRT resolution. With these consolidated cases, four of those five distributions have been appealed to this court.

At the outset, we observe what is common ground among the parties, namely that the nature of our review of CRT decisions is quite limited. A royalty determination is scarcely a typical agency adjudication. When claimants cannot agree among themselves on the appropriate distribution of the fund, they present their cases to the CRT, which resolves the dispute. Any particular royalty percentage established by the Tribunal is, moreover, doomed to be somewhat artificial; that is, it may well appear that it would have been as reasonable for the Tribunal to have fixed the percentage a little higher or

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[2] *See* 17 U.S.C. § 111(d)(5)(A), (C) (1982). Section 111(d)(5)(A) states in pertinent part:

> Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

Section 111(d)(5)(C) provides: "During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy."

a little lower. As we have previously suggested, mathematical exactitude in these matters appears well nigh impossible, *NAB v. CRT*, *supra*, 675 F.2d at 373; rough justice in dividing up the royalty pie seems to be the inevitable result of the process that Congress ordained.

In reviewing the Tribunal's determinations, the judicial task is not to weigh the evidence and fix what in our view would constitute appropriate percentages, for that would be to intrude into the function entrusted to the Tribunal. Our job, rather, is to determine whether the royalty awards are within a "zone of reasonableness"—not unreasonably high or unreasonably low—and that the CRT's decision is neither arbitrary nor capricious, and is supported by substantial evidence. *NAB v. CRT*, *supra*, 675 F.2d at 371, 374-75.[3]

II. Appeals From 1979 Proceedings

As with the Tribunal's first allocation (for calendar year 1978), much of the Tribunal's 1979 allocation was appealed to this court in *CBN v. CRT*, *supra*, 720 F.2d 1295. The CRT's allocation was upheld in all but three respects, namely, the Tribunal's decision to award no portion of the Royalty Fund to three separate groups of claimants: (1) the Devotional Claimants,[4] (2) commer-

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[3] This is also the standard of review employed in ratemaking cases coming from the Federal Energy Regulatory Commission ("FERC"), an area in which a highly deferential standard of review has traditionally been applied. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *South Dakota Pub. Util. Comm'n v. FERC*, 668 F.2d 333, 337 (8th Cir. 1982); *American Public Gas Ass'n v. FPC*, 567 F.2d 1016, 1029 (D.C. Cir. 1977).

[4] The Devotional Claimants are the Christian Broadcasting Network, Inc., the PTL Television Network, and the Old Time Gospel Hour. Each of the Devotional Claimants produces programs which are religious in content, although the Devotionals maintain at some length that their programming is not limited to overtly religious programs. The programs are

cial radio broadcasters, and (3) television broadcasters for their contribution to the quality of sports telecasts. On remand, the CRT reconsidered those three non-awards. The Tribunal reaffirmed its decision to award nothing to commercial radio broadcasters and to television broadcasters for the latter's contribution to sports telecasts; however, the Tribunal altered the Devotionals' zero award so as to grant them 0.35% of the total Royalty Fund. The award to the Devotionals and the reaffirmed non-award to commercial radio are now before us.

A. *The Devotional Claimants' Award*

The Devotionals contend that the record evidence demonstrates that their award should have been much higher than a measly 0.35%; in contrast, several petitioners, including the Motion Picture Association of America ("MPAA") and the Public Broadcasting Service ("PBS"), claim that the Tribunal did not have before it evidence to support any award to this group of claimants. In the view of these challengers, the Tribunal was correct the first time around in awarding nothing to the Devotionals. Next, moving beyond the debate over zero versus something, both the Devotionals and their opponents join, albeit from quite different perspectives, in the claim that the Tribunal gave no indication as to how it arrived at the figure of 0.35%. Hence, the Tribunal is attacked from all sides for having, in effect, pulled a number out of the air.

In *CBN v. CRT*, *supra*, we identified several specific arguments and pieces of evidence that the CRT failed to address in making its non-award to the Devotional Claimants, thus rendering its decision arbitrary. 720 F.2d at

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broadcast on local television stations throughout the country. Although the three claimants are independent of each other, the Tribunal has consistently placed the three together in a separate category, styled "Devotional Claimants," for the purpose of determining awards.

1309-12. On remand, the Tribunal addressed each of these points, and, as we will demonstrate, adequately responded to them.

(1)

First, we criticized the Tribunal for having failed to analyze the possible benefits that cable operators might enjoy by carrying the Devotionals' programs. In establishing appropriate royalty percentages, the CRT considered as a major criterion the benefit of the programming to cable systems, yet the Tribunal had not even discussed this criterion in reaching its 1979 decision on the Devotionals. We stated that evidence of record did exist, that the CRT was obliged to address, of benefit to cable systems. *Id.* at 1310.

On remand, the Tribunal stated that "some evidence" supported the proposition that devotional programming was of benefit to cable systems, but that "none of this evidence, in our view, significantly bolsters the devotional claims on the benefit standard, or can remotely be deemed similar to that which we have found to be supportive of the case of sports claimants."[5] 49 Fed. Reg. 20,049, J.A. at 2210 (footnote omitted). The CRT thus concluded that the record did not support a finding that cable operators welcomed the inclusion of devotional programs on distant signals to balance the carriage of non-religious programs. *Id.*

The Devotionals now claim that CRT's decision in this respect is conclusory, totally devoid of analysis as to why the Devotionals' evidence did not prove benefit.

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[5] The Tribunal found that sports programs have a special benefit to cable operators that justified a high award to the Joint Sports Claimants. 47 Fed. Reg. 9892-93, J.A. at 33-34. That is, sports programs constitute a particularly significant incentive for prospective cable subscribers to join the ever-growing ranks of cable television subscribers across the country.

We disagree. In support of its conclusion, the CRT relied upon the analysis of the Devotional Claimants' evidence set forth in the Settling Parties' Proposed Findings at 28-29, J.A. at 2289-90.[6] That analysis constituted a responsive critique to the evidence this court had identified as meriting the CRT's consideration and discussion on remand, *see* 720 F.2d at 1310. The Settling Parties' analysis concluded that, for various reasons, the Devotionals' evidence was, in the first instance, weak and in any event was directly contradicted by evidence introduced by other parties. While one could reasonably disagree with the Settling Parties' analysis, as the Devotionals fervently do, the Tribunal could reasonably invoke that analysis of the evidence adduced by the Devotional Claimants.

(2)

We also indicated in our prior decision that the Tribunal had failed to provide an adequate justification for treating the Devotionals' claims in a manner different from that accorded the claim of PBS. *Id.* On remand, the CRT elaborated on its reasons for this difference in treatment:

> The Devotional Claimants present only a single program while public broadcasting offers a range of programs, that in its diversity attracts a broad range of audience. The carriage of the public broadcasting signals indicates the appeal of their programing [sic]. Devotional programmming [sic] is but a small portion of a distant signal. Therefore, the carriage of that signal does not establish the appeal of devotional programming.

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[6] The Settling Parties were MPAA (and its associated program producers and syndicators), the Joint Sports Claimants, PBS, the Music Claimants, and National Public Radio. The proposed findings were submitted, pursuant to the Tribunal's established procedures, for the purpose of determining royalty distributions in the 1979 proceeding.

49 Fed. Reg. 20,050, J.A. at 2211. That is to say, inasmuch as a PBS station carries only PBS programming, the Tribunal concluded that a cable operator's decision to carry a PBS station reflects a judgment that PBS programming is of value. On the other hand, the decision to carry a station that carries one or more programs of the Devotional Claimants does not necessarily represent a determination by the cable operator that it was the devotional portion of that station's programming which was deemed valuable. Since the vast majority of that station's programming would be non-devotional, the Tribunal could reasonably conclude that it is more likely that the station was being carried by the cable operator because of its other, nondevotional shows.[7]

(3)

In the 1979 proceeding, the Devotionals had claimed that because of the retransmission of local stations carrying their programming, cable operators were less likely to carry the satellite networks of CBN and PTL. The upshot of this, the Devotionals contended, was less viewing of Devotional programming and fewer contributions to the Devotional Claimants than would otherwise obtain. The CRT had initially ruled that such a loss was not compensable; on review, however, this court held that if the Devotional Claimants could prove "that cable retransmission has measurably diminished their ability to exploit the contribution potential of their particular works, whether by satellite or otherwise," they could be compensated for such losses. 720 F.2d at 1312. At the same time, however, we noted that "proving such an attenuated loss would be extremely difficult." *Id.* Because

[7] In *CBN v. CRT*, we also remanded for an explanation of why the Devotionals received treatment different from that accorded Mutual of Omaha's "Wild Kingdom." 720 F.2d at 1310. The Tribunal gave an explanation on remand, 49 Fed. Reg. 20,050, J.A. at 2211, and the Devotional Claimants have not contested that explanation in this appeal.

the Tribunal had not even considered the Devotionals' evidence on this claim, we remanded the issue.

On remand, the Tribunal concluded that no evidence in the 1979 record supported an award for harm to CBN's and PTL's satellite networks. 49 Fed. Reg. 20,050, J.A. at 2211. The Devotionals attack this finding, arguing that they did in fact come forward with evidence to support their claim, and that the CRT was obliged—but failed—to address this evidence in detail. A review of the Devotionals' evidence, J.A. at 2242-46, however, demonstrates that it does not mandate the Tribunal's grant of an award on this ground. The evidence consists entirely of anecdotes and theories about how contributions from viewers might be diminished by cable retransmission.[8] There was no attempt by the Devotionals to provide any estimate as to the amount of losses they were experiencing. Our prior opinion made it clear, as we have seen, that the Devotional Claimants had to prove that their contributions had "measurably diminished," and that this would be "extremely difficult" to demonstrate, 720 F.2d at 1312. Our examination of the Devotionals' evidence on remand persuades us that the Tribunal was justified in concluding that the Devotionals lacked probative evidence to support their claim.[9]

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[8] For example, a CBN executive, Stanley Ditchfield, testified that a cable operator will either broadcast a station carrying CBN programming or CBN's satellite channel, but not both. J.A. at 2243-44. This is scarcely overwhelming evidence which the Tribunal, to engage in reasoned decisionmaking, was obliged to accept. Another example of the Devotionals' evidence is an anecdote about the Charlotte Cable Company's decision not to carry the PTL satellite network because it already imported a Washington, D.C. station that showed the "PTL Club" program. J.A. at 2244-45. This evidence could have been credited, but we cannot fault the Tribunal for determining that evidence of this sort should not alter the outcome.

[9] We cannot fail, however, to fault the Tribunal for its summary rejection of this evidence without setting forth its anal-

(4)

Finally, we remanded to the CRT on two other issues. First, the Tribunal had initially held that a "fundamental distinction" existed between the Devotional Claimants and all other claimants, in that the Devotional Claimants purchase air time to carry their programs. This commercial fact of life was deemed of some considerable significance; indeed, the CRT had previously deduced from this "distinction" that devotional programming enjoyed no market value. Second, the Tribunal had previously held that the Devotional Claimants may well benefit (receive a "negative harm") from cable retransmission by increasing financial contributions from an expanded universe of viewers. This fact was considered highly important since gifts and contributions from viewers constituted the paramount source of the Devotional Claimants' funds. We remanded these two issues inasmuch as the Tribunal had failed to take into account possible weaknesses in its conclusions and had failed to respond to the Devotional Claimants' arguments on these issues. 720 F.2d at 1309-11.

On remand, the Tribunal stated that it remained wedded to the view that the evidence adduced was consistent with its orginal conclusions with respect to the "fundamental distinction" and "negative harm" factors, but that the Tribunal had, in essence, decided not to rely upon those factors in making an award. MPAA and the

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ysis with some specificity as to why the evidence was deemed lacking. The inadequacy of the Commission's resources and its limited staff have been much observed and decried, *see, e.g., CBN v. CRT, supra,* 720 F.2d at 1304; *National Cable Television Ass'n v. CRT,* 689 F.2d 1077, 1087 n.74 (D.C. Cir. 1982), but the bedrock duty remains on the Tribunal to do the job with which it has been tasked. Nonetheless, the manifest weakness of the Devotional Claimants' evidence, especially in view of the daunting burden recognized by our prior decision, leads us, albeit with little enthusiasm, to uphold the Tribunal in this respect.

other claimants opposing the Devotionals' award (and, curiously, the Devotional Claimants themselves) now contend that this decision was irrational; they argue that if the Tribunal concluded that the evidence supported findings of a "fundamental distinction" and "negative harm," then the CRT had to weigh those factors against any possible award to the Devotionals.

We disagree. It was clear from our prior decision remanding the Devotionals' non-award that we did not find convincing the evidence supporting the "fundamental distinction" or "negative harm" theories. We now read the CRT's decision on remand as stating that, while the Tribunal still deemed the theories of a "fundamental distinction" and "negative harm" to be plausible, the evidence of record was not strong enough to overcome this court's criticism of those theories and thus could not justify the total denial of an award to the Devotional Claimants. The CRT on remand did not rely upon those theories, but merely stated that the evidence was "consistent with" a "fundamental distinction," and that under a "negative harm" theory, the Devotional Claimants "may not sustain a net loss." 49 Fed. Reg. at 20,050, J.A. at 2211. The Tribunal also stated that if evidentiary hearings were conducted in subsequent distribution proceedings, the Tribunal expected the parties to make a fuller record on those issues, *id.*, again indicating that the evidence in the 1979 proceeding was deemed insufficient. Given this court's clearly articulated wariness of the "fundamental distinction" and "negative harm" theories in the prior proceedings, we will not at this late date replough old ground and fault the Tribunal's decision in this respect.

(5)

In sum, we are persuaded that the Tribunal adequately addressed the issues on which we remanded its prior decisions denying any award to the Devotional Claimants. Nonetheless, both the Devotional Claimants

and their opponents argue that the actual award of 0.35% was arbitrary and capricious. The Devotional Claimants contend that since Nielsen viewing data indicated that devotional programming comprised 5% of all distant signal programming in 1979, and enjoyed a 1% viewing rating, the Devotionals' award should have been somewhere between 1% and 5%. On the other hand, MPAA and its allies argue that the Tribunal did not have before it evidence supporting any award, and thus that no award should have been made to the Devotional Claimants. In addition, both the Devotionals and their opponents contend that the Tribunal gave no indication as to how it arrived at 0.35%.

While we agree that the Tribunal's decision does not expressly articulate the precise manner in which it arrived at the figure of 0.35%, the CRT's past practices and the mandate of our remand in *CBN v. CRT* adequately indicate that manner, and satisfactorily demonstrate that the Tribunal's award was squarely within the zone of reasonableness. When this court remanded the 1979 proceedings, we stated that a complete non-award to a copyright holder would be "scrutinize[d] carefully," 720 F.2d at 1305, and that a non-award for programming that received a 1% viewing rating needed more explanation, in view of the Tribunal's position that Nielsen viewing data constituted the single most important genre of evidence. *Id.* at 1311. The implication of our opinion was clear: a complete non-award to the Devotional Claimants would have to be strongly justified.

On remand, when considering for the first time the question whether Devotional programming benefited cable operators, the CRT stated that there was "some evidence" of benefit. 49 Fed. Reg. 20,049, J.A. at 2210. Even though it found this evidence to be weak, the Tribunal obviously concluded that it would be difficult, in the face of this court's prior decision, to grant no award at all under those circumstances. When this over-

arching constraint emanating from our prior opinion is coupled with the CRT's general methodology of fixing awards by starting with Nielsen viewing ratings for the programming in question, and then reducing the Nielsen figure for weakness in evidence, *see, e.g.*, 47 Fed. Reg. 9892, J.A. at 38, the Tribunal's method for determining the Devotional Claimants' award becomes clear. Given the CRT's general approach, an award falling somewhere below 1% (due to weakness of evidence) but above 0 (due to the presence of some evidence) was suggested by the evidence of record. Given this analysis, the zone of reasonableness for the Devotionals' award was between 0% and 1%. The Tribunal's award of 0.35% fell comfortably within that zone.[10]

B. *Commercial Radio*

Cable systems retransmit the signals of radio stations, in addition to television station signals. Thus, among the hearty band of claimants for the Royalty Fund distributions were and are commercial radio broadcasters. In its original 1979 proceeding, however, the Tribunal

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[10] In the words of Judge Leventhal, in a rather different agency setting,

> [i]f satisfied that the agency has taken a hard look at the issues with the use of reasons and standards, the court will uphold its findings, though of less than ideal clarity, if the agency's path may reasonably be discerned, though of course the court must not be left to guess as to the agency's findings or reasons.

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). Nonetheless, the Tribunal's silence as to its rationale in this respect is troubling. Considerably more could have been provided by way of explanation, with only a modest effort, and thereby have at least reduced the enormous expendtiure of lawyer and judicial effort to divine the thinking of this Tribunal. The pains to which the actors on the judicial-review stage have had to go in this regard lead us emphatically to lay down a clear reminder to the Tribunal that shorthand and toss-away, conclusory sentences are no way to handle a multi-million dollar proceeding.

held that it could find no significant marketplace value for or benefit from cable retransmission of distant commercial radio stations; in consequence, no award was made to commercial radio broadcasters. 49 Fed. Reg. 9894, J.A. at 40. We remanded this decision because, although we concluded that ample evidence buttressed the Tribunal's conclusion that retransmission of radio broadcasts have little value, the CRT's decision to grant no award to commercial radio broadcasters appeared inconsistent with the Tribunal's decision to give some unspecified award to the Music Claimants for the use of copyrighted music on retransmitted radio signals. 720 F.2d at 1317-18. We directed the Tribunal either to provide an explanation for this difference in treatment between broadcasters and music claimants or to alter its awards.

On remand, the Tribunal adhered to its original decision, but explained why it deemed different awards to be warranted. The Tribunal reaffirmed its substantive conclusion that the broadcasters' contributions to radio retransmissions were, in essence, commercially worthless to the cable market, and that any value in the retransmission of commercial radio stations is attributable to the music played on those stations. The broadcasters' contention that their programming formats deserved compensation was, in the CRT's view, a claim for "compilation" applied to radio, 49 Fed. Reg. 20,051, J.A. at 2212, yet the Tribunal had already held in the context of television broadcasts (with this court's approval) that the value of compilations was *de minimis*. *See NAB v. CRT*, *supra*, 675 F.2d at 379; *see also* part III. B., *infra*. We find this conclusion—that people listen to retransmitted stations for the music, and thus any award for retransmitted radio broadcasters should go to the Music Claimants—to be reasonable.[11]

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[11] The commercial radio broadcasters claim that the explanation the Tribunal now offers for its different treatment

III. 1980 Proceedings

The Tribunal granted the same awards to all claimants for 1980 as it had in 1979. Several issues decided by the Tribunal in the 1980 Distribution Determination have now been appealed: (1) the National Association of Broadcasters and the Canadian Claimants argue that the CRT refused to evaluate their improved evidentiary showing in the 1980 proceedings, and instead changed an award only if evidence demonstrated that circumstances had changed between 1979 and 1980; (2) the NAB, as it has previously, claims that the CRT acted arbitrarily and capriciously when it determined that NAB's "broadcast day compilations" were commercially worthless and deserved no award; (3) the NAB claims that its programs deserve more than the 4.5% awarded by the Tribunal, while MPAA claims that NAB's 4.5% award is too high; and (4) the Devotionals, Commercial Radio, and the Canadian Claimants, each of which received the same award in 1980 as in 1979 (0.35%, 0,

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of commercial radio and Music Claimants was rejected by this court in *CBN v. CRT*, *supra*, as a *post hoc* argument, and that it was no less *post hoc* when the Tribunal adopted the argument on remand. But we rejected the compilation argument only because the Tribunal had not given that reason, or indeed *any* reason, for its differential treatment; thus, the attempt by CRT's counsel in that earlier appeal to give an explanation based on the compilation argument had to be rejected as a *post hoc* explanation of counsel unsupported by the record. While we expressed doubt as to whether the Tribunal would accept counsel's argument, *see* 720 F.2d at 1318, we certainly did not hold that the CRT did not or could not accept that argument, since the Tribunal had not spoken to the matter at all. On remand, the Tribunal stated that it had failed in its original decision to indicate precisely what it had been seeking to do with respect to commercial radio and the Music Claimants, and why, 49 Fed. Reg. 20,051, J.A. at 2212; the CRT then gave the explanation we have described in the text. We have no reason to question the Tribunal's clear statement that this was the reasoning it had always had in mind but had failed previously to articulate.

and 0.75%, respectively), argue that their awards are unjustifiably low (or non-existent, in Commercial Radio's case).

A. *"Changed Circumstances"*

In the 1980 Distribution Determination, the NAB and the Canadian Claimants presented evidence that, in their view, demonstrated, first, that certain conclusions in the 1979 Determination were incorrect, and second, that these claimants deserved higher awards in the 1980 Determination.[12] In the face of that evidence, NAB and the Canadian Claimants (indeed, as we already observed, *all* claimants) received the same awards in the 1980 Determination as in the prior year. NAB and the Canadian Claimants argue that the reason the CRT reached precisely the same result is that the Tribunal decided to make a different award for 1980 than for 1979 if and only if a claimant could show that circumstances had changed between 1979 and 1980.[13] NAB and the Canadian Claimants maintain that it was arbitrary and capricious for the Tribunal to lock itself into its past judgments and thereby ignore new evidence that might show past decisions to have been infected with error.

(1)

We agree that, as the parties themselves recognize, it would be improper, as a matter of law, for the Tribunal to rely solely upon a standard of "changed circumstances." The invalidity of this rigid approach is strongly

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[12] This evidence is summarized in parts II. C. and II. D., *infra*.

[13] All parties appear to agree that the 1980 award to Multimedia was not based solely on "changed circumstances," *see* Canadian Claimants Reply Brief at 4-5. To the contrary, the Tribunal discussed in detail new evidence relevant to Multimedia's claim and how that evidence affected Multimedia's award. *See* 48 Fed. Reg. 9568-69, J.A. at 2206-07.

suggested by our two prior opinions, which expressly contemplated that in the annual determination process the claimants would improve upon the quality and sophistication of their evidentiary submissions. At the same time, it is entirely appropriate for the Tribunal to employ, as one of its analytical factors, the determination whether circumstances have changed in the course of the ensuing twelve months, inasmuch as that conclusion will obviously be relevant to the question whether an award should differ from the prior year's award. But if a claimant presents evidence tending to show that past conclusions were incorrect, the Tribunal should either conclude, after evaluation, that the new evidence is unpersuasive or, if the evidence is persuasive and stands unrebutted, adjust the award in accordance with that evidence.

The CRT, however, denies having employed an exclusive, "changed circumstances" standard. Upon examining the Tribunal's 1980 Determination, we agree that it did not in fact do so. The Tribunal clearly discussed the new evidence proffered by NAB and the Canadian Claimants. For example, the CRT determined, after analysis, that a new survey submitted by NAB and testimony by two cable operators did not justify a higher award.[14] 48 Fed. Reg. 9565, J.A. at 2203. The Tribunal also analyzed new evidence put on by the Canadian Claimants, but found that evidence unpersuasive. *Id.* at 9567, J.A. at 2205. The CRT, in addition, discussed and analyzed attempts by other claimants, such as MPAA and associated program suppliers and Multimedia, to improve the quality of their evidence, *see* 49 Fed. Reg. 9564, 9568, J.A. at 2202, 2206, and criticized the Devotional Claimants for failing even to attempt to adduce better evidence, *see id.* at 9568, J.A. at 2206 ("Most claimants in the 1980 proceeding sought to im-

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[14] This evidence is discussed *infra* pages 24-25 & n.17.

prove their presentation in areas where the Tribunal has found gaps or deficiencies. No such undertaking was made by the devotional claimants.").

(2)

In seeking to demonstrate that the CRT relied solely upon "changed circumstances," NAB and the Canadian Claimants essentially glide over the actual decision of the Tribunal; instead, they rely heavily upon a dissent from the 1980 Determination by Commissioner Burg. In her dissent, Commissioner Burg stated that the

> basis for the allocations reached by the majority in Phase I was predicated . . . on the assumption that the Tribunal was bound by the precedents of its previous decisions, and could not alter those previous allocations unless the facts had materially changed. All evidence therefore had to be viewed through the prism of "changed circumstances."

49 Fed. Reg. 9569, J.A. at 2207 (footnote omitted).[15] NAB[16] also points to a letter from Commissioner Brennan, cited by Commissioner Burg in her dissent. There, Commissioner Brennan expressed dissatisfaction with a Phase II award of 1.6% to Multimedia, stating that such an award was inconsistent with the rationale of the Phase I awards. This statement does not mention "changed circumstances" at all, and NAB does not explain why it should be read to support its position. Nonetheless, NAB

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[15] As suggested by Commissioner Burg's statement, and as more fully described in this court's two previous decisions, the Tribunal divides its Determinations into two phases. In Phase I, the CRT determines the percentage of the Royalty Fund that is to be distributed to each of several general categories. Then, in Phase II, the Tribunal determines the distribution to specific claimants within each category.

[16] For the sake of convenience, the arguments of both NAB and the Canadian Claimants with respect to "changed circumstances" will be attributed solely to NAB.

appears to be saying the following: since all agree that the Multimedia award was *not* based solely on "changed circumstances," *see supra* note 13, Commissioner Brennan's statement that the rationale for the Multimedia award was different from the rationale for other awards must mean that, as to the other awards, only a "changed circumstances" standard was applied. Finally, NAB argues that statements made by Commissioner Coulter during the evidentiary presentations in the 1980 proceedings demonstrated that yet another Commissioner believed the Tribunal would be acting arbitrarily and capriciously if, in the absence of "changed circumstances," it granted an award in 1980 differing from that conferred in 1979. *See, e.g.*, J.A. at 2690.

We find these arguments unpersuasive. Commissioner Burg's dissent, which was joined by no other Commissioner, obviously did not purport to reflect the Tribunal's views. Her statement simply cannot override the Tribunal's own discussion and analysis of new evidence, *see supra* pages 20-21. As for Commissioner Brennan's letter, the excerpts cited by Commissioner Burg nowhere mentioned the use, or lack of use, of a "changed circumstances" standard. Commissioner Brennan merely spoke of "the rationale" used in the Phase I determination. He did not describe what he believed that rationale to be or how the rationale for Multimedia was different. Because of this lack of clarity, we cannot conclude that Commissioner Brennan's letter demonstrated that the CRT relied exclusively upon "changed circumstances."

Finally, the Tribunal maintains that Commissioner Coulter's comments were in fact questions to the parties before the CRT and did not reflect his personal views. CRT Brief at 39 n.4. We need not march into that thicket of subjectivity, however, because even if Commissioner Coulter was erroneously of the view at the time evidence was being presented that the Tribunal must look only to "changed circumstances" from the previous year,

nothing in the record indicates that Commissioner Coulter adhered to that notion when he participated and concurred in the actual Distribution Determination. Indeed, Commissioner Coulter expressed no disagreement with the CRT's decision as to Multimedia, even though (as we noted above) that decision did not rely solely upon "changed circumstances."

B. *Broadcast Day Compilations*

In the 1980 proceedings, the NAB renewed its royalty claim based upon the efforts of broadcasters in compiling "broadcast days," that is, "the process by which broadcasters select programs from among diverse alternatives and assemble them with other program elements into a broadcast schedule that is usable by and attractive to viewers." NAB Brief at 18. In the 1978 and 1979 proceedings, the Tribunal determined that broadcast day compilations have no commercial value for cable operators and accordingly granted no award for them. In 1980, NAB presented new evidence on the issue, but the Tribunal reached the same result:

> We find that broadcast day compilation is of no value to a cable system. We reject the argument of NBA [sic] that it is the broadcast compilation which creates "a station image which is highly promotable by cable operators." Cable systems are interested in the programs on a distant signal which induce persons to subscribe, not in the scheduling and promotion.

48 Fed. Reg. 9566, J.A. at 2204.

NAB argues that, in order to engage in reasoned decisionmaking, the CRT was obliged to give a more complete explanation of why it rejected NAB's unrebutted evidence. But NAB's evidence, as its own brief shows, consists almost exclusively of statements by NAB members and officers as to how valuable they believe broadcast day compilations to be. NAB Brief at 19-21. The

CRT was under no obligation, in order to avoid arbitrariness and caprice, to explain why its view as to the worth of such compilations was unaltered by self-serving statements of the claimant itself.

In addition, NAB argues that the Tribunal's award to the Music Claimants for background music in television shows is inconsistent with its non-award for broadcast day compilations, inasmuch as both broadcast day compilations and background music are unobtrusive and unnoticeable to the television viewer. NAB further contends that viewers do not watch television shows or subscribe to cable because of background music; thus, the argument runs, the CRT's decision that no one subscribes to cable television because of broadcast day compilations is not a valid reason for a non-award.

These arguments cannot carry the day. Broadcast day compilations and background music are not so similar that the CRT cannot reasonably treat them differently. In the Tribunal's view, background music improves the quality of programs, and thus people are more likely to want to watch those programs even though they may not choose to do so exclusively because of the background music. *See* 48 Fed. Reg. 9558, J.A. at 2196. On the other hand, the Tribunal has consistently determined, with this court's approval, *see NAB v. CRT*, *supra*, 675 F.2d at 379, that broadcast day compilations neither add to the value of programs nor make it more likely that people will wish to watch those programs. These determinations are reasonable and well within the Tribunal's authority.

C. *NAB's 4.5% Award*

NAB received a 4.5% award for local programs, such as local news and public affairs programming, produced by its member stations and transmitted to nearby (though technically "distant") communities. Decrying its award as unjustifiably low, the NAB points to evidence

presented in 1980, especially a new survey of more than 400 cable operators. In that survey, the cable operators ranked on a scale of one to five the value they placed on different types of programming. The survey results, NAB contends, demonstrate that NAB's local programming was quite valuable, thereby warranting a higher award than the paltry 4.5% it received. On the other hand, MPAA argues that the relevant evidence demonstrated that NAB's 4.5% award was too high.

We hold that the CRT's decision in this request is within the zone of reasonableness. NAB's new survey may have shown that its programs have value, but this evidence did not demonstrate that value to be greater than 4.5% of the Royalty Fund; as the Tribunal stated, "[w]e have never asserted that station programming is of no value to cable operators, but the value of such programming is adequately compensated in our [4.5%] award to commercial television." 48 Fed. Reg. 9565, J.A. at 2203. Similarly, we are not persuaded by MPAA's argument that new evidence presented at the 1980 proceedings, such as the testimony of two cable operators,[17] is powerful enough to remove the 4.5% award from the zone of reasonableness.

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[17] Indeed, the two cable operators (who were called as witnesses by NAB) are cited by *both* NAB and MPAA as supporting their respective positions. One of the cable operators testified that cable systems serving small communities tend to bring in stations from major metropolitan areas, not the nearby larger markets. J.A. 2715-16. MPAA blatantly mischaracterizes this evidence by claiming that it shows that people wanted *all* programming from major areas, *not* local programming. MPAA Brief at 12. But the major metropolitan stations have local programming, and the cable operator explicitly stated that the superior local programming of these stations is one reason his viewers wanted access to them. J.A. 2715. On the other hand, the testimony that local programming has value does not demonstrate that value to be greater than the 4.5% of the Fund awarded by the Tribunal.

D. *Devotional Claimants', Commercial Radio's and Canadian Claimants' Awards*

The Devotionals presented one new piece of evidence in the 1980 proceedings, namely a statement by one cable operator that devotional programming was popular in the South and that his subscribers would be irate if he discontinued devotional programming. CBN Brief at 22. This single new item of evidence, while relevant, is not so persuasive as to require the Tribunal to modify its awards; 0.35% is still within the zone of reasonableness. As for Commercial Radio, their arguments for 1980 are the same as for 1979, so for the reasons stated above, *see supra* page 17, we find the decision to award nothing to Commercial Radio to be reasonable.

The Canadian Claimants argue that new evidence which they presented in the 1980 proceedings required an award exceeding their 1979 level (0.75%). The most important new evidence was aimed at improving the record to correct deficiencies in proof as to how much Canadian programming was carried on American cable systems. Despite this evidence, the Tribunal found that "the record does not reflect any increase in distant signal carriage of Canadian stations on [sic] 1980 over 1979." 48 Fed. Reg. 9567, J.A. at 2205. The Canadian Claimants reply that they were not attempting to show an increase; instead, they believe that their award in 1979 was decreased because of deficiencies in their evidence, and thus, when their evidentiary submission was improved, their award should have been increased. Granting the premise, the conclusion does not follow. The Tribunal noted that "[m]ost claimants in the 1980 proceeding sought to improve their presentation in areas where the Tribunal had found gaps or deficiencies." *Id.* at 9568, J.A. at 2206. Thus the issue is not whether the Canadians objectively improved the quality of their evidentiary submissions, but rather whether any such improvement was sufficient to warrant an award from the 1980 fund greater than

the 1979 award, in light of the submissions made by other claimants. The Tribunal's conclusion that no increase in the Canadians' relative share was justified is sufficiently rational to survive review.

The Canadian Claimants also presented new evidence designed to show that their programming appeals to American audiences. This evidence consisted of videotapes of Canadian programming, awards bestowed upon Canadian programs, and testimonial observations as to the uniqueness of Canadian programs. Canadian Claimants Brief at 27-29. The Tribunal, however, evidently decided that commercial sales of Canadian programming in the United States constituted the best evidence as to the appeal of Canadian programming, and that this evidence did not demonstrate any such appeal. 48 Fed. Reg. 9567, J.A. at 2205. The Tribunal acted within its discretion in relying on this more concrete kind of evidence, as opposed to claims of program quality and uniqueness. Finally, we find unpersuasive the Canadians Claimants' arguments that French-language programming has a significant value to American cable systems. All in all, the Tribunal's award was within the zone of reasonableness.

IV. 1982 Proceedings

For the final phase of our review, three main issues are presented from the 1982 Distribution:[18] (1) whether and to what extent the Tribunal is required to investigate the copyright status of MPAA products; (2) whether the reduced award to Multimedia was proper and supported by substantial evidence; and (3) whether the award to the Devotional Claimants was supported by substantial evidence.

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[18] Most claimants settled in the 1981 Distribution. Judiciously, no one elected to appeal the few 1981 claims that the CRT was called upon to resolve.

A. *MPAA's Copyright Ownership*

The Tribunal has never required a claimant to prove copyright ownership as to all of its programs which were retransmitted by cable. To the contrary, the CRT requires by regulation only that a claimant list one program transmitted by cable to which the claimant owns the copyright. 37 C.F.R. § 302.3(d). Thus, MPAA—which each year has captured the lion's share of the fund—has never provided the CRT with a list of the thousands of programs (movies, in the main) for which it has claimed royalties over the years. In *CBN v. CRT*, *supra*, the Devotional Claimants argued that this procedure may have allowed MPAA improperly to earn royalties as to works that may have been in the public domain. 720 F.2d at 1313. We held, however, that "there is substantial evidence in the record to support the Tribunal's conclusion that its awards went only to bona fide copyright owners." *Id.*[19]

In the 1982 proceedings, Multimedia presented evidence that eight movies broadcast on cable by WTBS[20] of Atlanta were not protected by copyright. Multimedia

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[19] The PTL Television Network and Old-Time Gospel Hour have asked us to reconsider this holding in the 1979 Determination and again to examine the 1979 evidence to determine whether sufficient evidence of copyright ownership by MPAA was presented. Even were we desirous in this age of congested court dockets to reopen clearly settled issues, the salutary and sensible principles of *res judicata* happily prevent us from doing so. However, our decision as to the 1979 Determination does not preclude a claimant from presenting new evidence in a later proceeding in an attempt to show that MPAA's claim is no longer supported by substantial evidence. Thus, Multimedia was not precluded from contesting MPAA's claim in the 1982 proceeding.

[20] Atlanta's WTBS is one of several "superstations" that are carried by a great number of cable systems over most of the country, as is Chicago's WGN, referred to *infra* pages 30-32.

argued that this showing (1) raised serious doubts as to the number of programs for which MPAA enjoyed copyrights, and (2) shifted the burden of proof to MPAA to list all programs which it claimed and to prove its copyright ownership of each. The Tribunal disagreed; it found these eight movies to be such a small percentage of the total programming claimed by MPAA as to be *de minimis*. The Tribunal stated: "[W]e do not intend to burden claimants with a totally unnecessary exercise in paper collection because there may be some public domain films included in the Nielsen Study." 49 Fed. Reg. 37,656-57, J.A. at 79-80.

Although we are troubled, as we shall presently elaborate, by the Tribunal's procedures in this respect, we nonetheless uphold the Tribunal on this issue. Importantly, Multimedia did not challenge the CRT's regulation on proving copyright ownership, and it would be inappropriate at this late stage to penalize MPAA for its compliance with the Tribunal's existing regulations. Furthermore, the weakness of Multimedia's evidence, while suggesting flaws in the Tribunal's current procedures, justifies the Tribunal's specific decision in this Distribution Determination. Proof that eight obscure movies [21] shown on one "superstation" may not in fact enjoy copyright protection hardly requires the CRT to wade through the copyright status of thousands of programs. Finally, it appears from the record that Multimedia did not present its evidence until very late in the process, during cross-examination of MPAA's witness. *See* J.A. at 1417-22. It is unreasonable to ask the Tribunal to engage in (or direct the engaging in) thousands of hours of research at the eleventh hour in an already protracted process.

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[21] The eight movies, including such memorable blockbusters as "Cast a Dark Shadow," "It's a Wonderful World," and "Sail into Danger," are dutifully set forth for the edification of silver screen aficionados in Multimedia's Brief at page 18.

Nevertheless, this matter raises a troublesome point posing potential difficulties for the Tribunal in future proceedings, should a timely challenge be mounted to CRT's regulation in this respect. It may be a reasonable concession to the much bewailed size and staff limitations under which the CRT labors for the Tribunal to presume copyright ownership as long as one valid program supports the claim. But the reasonableness of the Tribunal's regulation is undermined by the lack of a procedure by which an opposing claimant can obtain access to data bearing upon other claimants' copyright ownership. Without knowing what programs are being claimed, an opposing claimant is virtually disabled from mounting an effective challenge on the issue of copyright ownership. If the Tribunal wishes to rest on a presumption of ownership, it should nonetheless provide opposing claimants with some means of obtaining information concerning the copyright status of programs for which other claimants seek royalties. While it is emphatically not our function to mandate any specific procedure in this respect, the Tribunal could, for example, consider requiring that a claimant (as a condition for receiving royalties) place in the record a list of all programs for which it is seeking royalties. Whatever procedure the Tribunal chooses to adopt, the goal to be achieved is for the CRT to establish, consistent with orderly procedures and expeditious proceedings, a sensible way in which a good-faith examination of and challenge to copyright ownership can be effected.

B. *Multimedia's Award*

Multimedia received a 1% award in the 1982 Determination, down from its 1.6% award in previous years. The reason articulated by the Tribunal for this reduction is that Multimedia's most important program, "Donahue," was no longer carried on WGN-TV—a Chicago "superstation"—but instead on another station which was not

carried on nearly as many cable systems. In consequence, "Donahue" had far fewer cable system viewers. The CRT concluded that this development greatly reduced the marketplace value of "Donahue" and its benefit to cable operators; because the value of "Donahue" was so central to Multimedia's awards in previous determinations, a reduction in the award for 1982 was, the Tribunal concluded, justified. 49 Fed. Reg. 37,655, J.A. at 79.

Multimedia argues that in previous determinations its award was never *increased* by virtue of "Donahue" being carried on WGN; as a result, Multimedia contends, it is inconsistent for the CRT now to penalize Multimedia because "Donahue" is no longer on WGN. Multimedia claims that, despite the fact that WGN was carried on ever increasing numbers of cable systems over past years, the CRT never found that the increase in carriage resulted in more harm to Multimedia or an increase in the value of "Donahue" to cable operators.

Notwithstanding its superficial appeal, Multimedia's interpretation of the basis for the Tribunal's past awards is simply incorrect. In prior determinations, the Tribunal stated that it was basing Multimedia's award in part on the possible harm to Multimedia arising from the increasing amount of retransmission of WGN on cable systems. *See* 1980 Distribution Determination, 48 Fed. Reg. 9569, J.A. at 60; 1981 Distribution Determination, 49 Fed. Reg. 7848, J.A. at 66. This very factor was thus taken into account by the Tribunal in arriving at Multimedia's 1.6% award.

As for the effect of WGN's carriage on marketplace value, it simply is impossible to conclude how much weight, if any, the Tribunal placed on this factor in earlier proceedings when it evaluated the marketplace value and benefit to cable operators of Multimedia's programming. In its prior decisions, the Tribunal did not state that it was giving Multimedia credit for carriage on WGN, nor did it say it was not giving Multimedia

credit. The Tribunal simply said nothing on this point. If Multimedia was of the view that it was not being given fair consideration for the carriage of "Donahue" on WGN, it should have appealed that issue in the earlier proceedings. It did not do so and cannot now be heard to complain of that earlier action by the Tribunal.

Inasmuch as we cannot conclude that the Tribunal failed in the past to give credit to Multimedia for the carriage of "Donahue" on WGN, we cannot say that the CRT was inconsistent in the 1982 proceeding when it reduced Multimedia's award based on the absence of carriage on WGN. All we can do is determine whether the Tribunal's decision to lower Multimedia's award based on the change was reasonable. We conclude that it was. "Donahue" was Multimedia's most important program, and its carriage and viewership on cable dropped dramatically betwen 1981 and 1982. 49 Fed. Reg. 37,655, J.A. at 79. Such a drop obviously demonstrates a reduction in value and supports a Tribunal decision to make a reduced award.[22]

C. *Devotional Claimants' Award*

The Tribunal increased the Devotional Claimants' award to 1% in the 1982 Determination. The Devotionals complain that this figure is still too low, while virtually all other claimants believe it to be far too high.

The Devotional Claimants' major item of new evidence in the 1982 proceedings was a survey of cable subscribers which asked them to list the main reasons they subscribe to cable television. Four percent of the subscriber-

[22] Multimedia advances several other arguments as to why its award is too low, including a claim that the Tribunal underestimated the amount of programming besides "Donahue" that Multimedia distributed. However, because of the overwhelming importance of "Donahue" to Multimedia's award, none of Multimedia's additional arguments persuade us that its award was outside the zone of reasonableness.

respondents listed as one such reason the desire to obtain devotional programming. J.A. at 623. The Tribunal noted that this survey, coupled with other new evidence submitted by the Devotional Claimants, represented an effort by the Devotionals to respond to evidentiary deficiencies identified by the CRT in earlier proceedings. The Tribunal concluded that, while the new evidence was not without flaws, it did demonstrate some value on the part of the devotional programming—enough to justify a 1% award. 49 Fed. Reg. 37,654-55, J.A. at 78-79.

We find the Tribunal's decision supported by substantial evidence. The Devotionals' new evidence, while indicative that devotional programming is of some value, is not so strong in our view as to mandate an award greater than one percent. On the other side, MPAA and others argue that the Devotionals' evidence was too flawed to justify any increase in their award, and that other evidence showed the Devotional Claimants' evidence to be commercially worthless. But the Tribunal never claimed that the Devotionals' new evidence was perfect; as for evidence of market worthlessness, MPAA's evidence went mostly to the question of the value of Devotionals' programs to local stations, not to cable operators. We believe the evidence placed the Tribunal's modest increase in the Devotional Claimants' award within the zone of reasonableness.

The Devotional Claimants interpose two other objections to the 1982 proceedings. First, they claim that the procedure employed by the Tribunal was in violation of the Copyright Act. In the 1982 proceedings, all claimants except the Devotional Claimants and Multimedia agreed among themselves as to the percentages of the Royalty Fund. The claims of the Devotionals and Multimedia together totalled less than 10%; thus, the Tribunal distributed 90% of the fund to the Settling Parties for distribution as per their agreement. The claims of the Devotionals and Multimedia were then argued before the Tri-

bunal, and the various Settling Parties presented evidence and arguments as to why the Devotionals and Multimedia should receive less than they were asking. The Devotionals argue that the Copyright Act and due process requirements were violated by requiring only the Devotionals and Multimedia to prove their cases. The Devotionals maintain that the Tribunal should not have distributed funds to the Settling Parties unless those parties had proved their entitlement to the percentages agreed upon in the settlement.

This argument is without merit. As we previously observed, the Copyright Act anticipates that parties may settle their claims, and that they can receive any part of the fund not in controversy. *See supra* note 1. We would effectively eliminate the likelihood for settlements if we accepted the Devotionals' contention that when one claimant—no matter how modest that claimant's likely share under even the most sanguine view—chooses not to settle with the other claimants, all awards would thereby be in controversy and a full hearing on all claims would be required. Past history suggests that at least one claimant will in any given proceeding feel sufficiently aggrieved to upset the settlement apple cart. More fundamentally, inasmuch as the Devotionals never claimed any of the 90% of the fund that was distributed to the settling parties, we cannot see in what manner they were harmed by the Tribunal's approach here.

Second, the Devotionals maintain that the Tribunal has made a judgment that PBS programming is better and more worthy of support than devotional programming, and that this is partly the reason for PBS's receiving a higher award than the Devotionals. We find no evidence that this is the case. However, we caution the Tribunal that while it may use quality of programming as a factor, *see CBN v. CRT*, *supra*, 720 F.2d at 1303, it would not be within its power to distribute royalties on the basis of a view that PBS has some sort of "special place" in broad-

casting. The Tribunal should rely, as it has in the past, on marketplace criteria, not on subjective assessments as to the value and importance of one sort of programming as opposed to another.

Finally, CBN contends that the Tribunal's decisions over the years evince an unconstitutional hostility toward broadcasting carried on as part of its Christian ministry. We find no evidence that this is so. In the first place, the Tribunal in the 1982 Determination increased the Devotionals' award to 1%, a decision scarcely suggestive of hostility to CBN (or its co-workers in the religious-broadcasting vineyard). Second, the real target of CBN's fire is language in the Tribunal's original 1980 Determination referring to the Devotionals' "Christian Ministry." *See* CBN Brief at 40-41; 48 Fed. Reg. 9568, J.A. at 2206. But that 1980 Determination was thereafter vacated entirely by this court, at the CRT's request, in the wake of our partial remand of the 1979 Determination. The 1980 Determination now before us contains no language indicating any hostility toward the Devotional Claimants. In a word, we can find no evidence to support the proposition that CBN was not awarded its "fair share" of copyright royalties, CBN Brief at 41, much less that this alleged shortfall resulted from anti-sectarian sentiments harbored by the Tribunal.

V. Conclusion

We have thus concluded this third lengthy expedition into the arena of copyright royalty distributions. We emerge from our analysis of these inherently subjective judgment calls and rough balancing of hotly competing claims with one overriding conclusion: it is the Tribunal which Congress, for better or worse, has entrusted with an unenviable mission of dividing up the booty among copyright holders. Given the potential monetary stakes, the claimants' studied tack to date of "boundless litigiousness." 720 F.2d at 1319, directed at the various

nooks and crannies of the Tribunal's decisions is perhaps understandable. But with today's decision joining the ranks of our two prior exercises of review, the broad discretion necessarily conferred upon the Copyright Royalty Tribunal in making its distributions is emphatically clear. We will not hesitate henceforth, should this tack of litigation-to-the-hilt continue to characterize the aftermath of CRT distribution decisions, to refrain from elaborately responding to the myriad of claims and contentions advanced by a highly litigious copyright-owner subculture.

Denied.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1983

No. 83-1321

OLD-TIME GOSPEL HOUR,
Petitioner

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent

MAJOR LEAGUE BASEBALL, *et al.*,
MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
NATIONAL PUBLIC RADIO,
NATIONAL ASSOCIATION OF BROADCASTERS,
CHRISTIAN BROADCASTING NETWORK, INC.,
SUPERSTATION, INC.,
CANADIAN BROADCASTING CORPORATION, *et al.*,
NATIONAL BASKETBALL, *et al.*,
NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
NATIONAL HOCKEY LEAGUE,
MULTIMEDIA PROGRAM PRODUCTIONS, INC.
AMER'CAN SOCIETY OF COMPOSERS, AUTHORS
& PUBLISHERS, *et al.*
BROADCAST MUSIC, INC.
PUBLIC BROADCASTING SERVICE, *et al.*
SIN, INC.
Intervenors

AND CONSOLIDATED CASES

Before: Robinson, Chief Judge
Wald* and Scalia, Circuit Judges

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* Circuit Judge Wald did not participate in this order.

ORDER

[Filed February 9, 1984. George A. Fisher, Clerk]

Petitioners Christian Broadcasting Network, Inc., Old-Time Gospel Hour, and PTL Television Network have moved the court to reverse the decision of the Copyright Royalty Tribunal in this case. The Tribunal has moved for a remand of the same decision. Upon consideration of these motions and the responses thereto, it is

ORDERED by the court that the decision of the Copyright Royalty Tribunal is vacated and the case is remanded to the Tribunal for proceedings consistent with this court's opinion in *The Christian Broadcasting Network, Inc. v. CRT*, —— F.2d ——, Nos. 82-1312, et al. (decided October 25, 1983). It is

FURTHER ORDERED by the Court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on June 15, 1982.

Per Curiam

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1312

THE CHRISTIAN BROADCASTING NETWORK, INC.,
APPELLANT

v.

THE COPYRIGHT ROYALTY TRIBUNAL, APPELLEE

MAJOR LEAGUE BASEBALL, ET AL.,
MULTIMEDIA PROGRAM PRODUCTIONS, INC.,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.,
NATIONAL PUBLIC RADIO,
SUPERSTATION, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BROADCAST MUSIC, INC.,
OLD-TIME GOSPEL HOUR,
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
SPANISH INTERNATIONAL NETWORK, INC.,
CANADIAN BROADCASTING CORPORATION,
PUBLIC BROADCASTING SERVICE, ET AL., INTERVENORS

No. 82-1326

OLD-TIME GOSPEL HOUR, APPELLANT

v.

COPYRIGHT ROYALTY TRIBUNAL, APPELLEE

MULTIMEDIA PROGRAM PRODUCTIONS, INC.,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.,
NATIONAL PUBLIC RADIO,
SUPERSTATION, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BROADCAST MUSIC, INC.,
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
MAJOR LEAGUE BASEBALL, ET AL.,
CHRISTIAN BROADCASTING NETWORK,
SPANISH INTERNATIONAL NETWORK, INC.,
CANADIAN BROADCASTING CORPORATION,
PUBLIC BROADCASTING SERVICE, ET AL., INTERVENORS

No. 82-1327

PTL TELEVISION NETWORK, APPELLANT

v.

COPYRIGHT ROYALTY TRIBUNAL, APPELLEE

MAJOR LEAGUE BASEBALL, ET AL.,
MULTIMEDIA PROGRAM PRODUCTIONS, INC.,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.,
NATIONAL PUBLIC RADIO,
SUPERSTATION, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS,
BROADCAST MUSIC, INC.,
OLD-TIME GOSPEL HOUR,
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
CHRISTIAN BROADCASTING NETWORK,
SPANISH INTERNATIONAL NETWORK, INC.,
CANADIAN BROADCASTING CORPORATION,
PUBLIC BROADCASTING SERVICE, ET AL., INTERVENORS

No. 82-1371

THE NATIONAL ASSOCIATION OF BROADCASTERS,
PETITIONER

v.

COPYRIGHT ROYALTY TRIBUNAL, RESPONDENT

MULTIMEDIA PROGRAM PRODUCTIONS, INC.,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.,
NATIONAL PUBLIC RADIO,
SUPERSTATION, INC.,
BROADCAST MUSIC, INC.,
OLD-TIME GOSPEL HOUR,
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
MAJOR LEAGUE BASEBALL, ET AL.,
CHRISTIAN BROADCASTING NETWORK, INC.,
SPANISH INTERNATIONAL NETWORK, INC.,
CANADIAN BROADCASTING CORPORATION,
PUBLIC BROADCASTING SERVICE, ET AL., INTERVENORS

No. 82-1372

THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.,
ITS MEMBER COMPANIES, AND OTHER PROGRAM PRODUCERS
AND DISTRIBUTORS, PETITIONERS

v.

COPYRIGHT ROYALTY TRIBUNAL, RESPONDENT

NATIONAL PUBLIC RADIO,
SUPERSTATION, INC.,
BROADCAST MUSIC, INC.,
NATIONAL ASSOCIATION OF BROADCASTERS,
OLD-TIME GOSPEL HOUR,
MULTIMEDIA PROGRAM PRODUCTIONS, INC.,

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
MAJOR LEAGUE BASEBALL, ET AL.,
CHRISTIAN BROADCASTING NETWORK,
SPANISH INTERNATIONAL NETWORK, INC.,
CANADIAN BROADCASTING CORPORATION,
PUBLIC BROADCASTING SERVICE, ET AL., INTERVENORS

No. 82-1383

SPANISH INTERNATIONAL NETWORK, INC., APPELLANT

v.

COPYRIGHT ROYALTY TRIBUNAL, APPELLEE

NATIONAL ASSOCIATION OF BROADCASTERS,
MOTION PICTURE ASSOCIATION OF AMERICA, INC., ET AL.,
MULTIMEDIA PROGRAM PRODUCTIONS, INC.,
SUPERSTATION, INC.,
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS,
MAJOR LEAGUE BASEBALL, ET AL.,
BROADCAST MUSIC, INC.,
CHRISTIAN BROADCASTING NETWORK,
CANADIAN BROADCASTING CORPORATION,
PUBLIC BROADCASTING SERVICE, ET AL., INTERVENORS

Appeal from an Order of the
Copyright Royalty Tribunal

Argued December 14, 1982

Decided October 25, 1983

Dennis Lane, with whom *Arthur Scheiner* was on the brief for petitioners/intervenors Motion Picture Associa-

tion of America, Inc., et al., in 82-1372, 82-1312, 82-1326, 82-1327, 82-1371 and 82-1383.

W. Thad Adams, III, for appellant PTL Television Network in 82-1327.

Victor E. Ferrall, Jr., with whom *John I. Stewart, Jr.*, *Robert M. Halperin*, *Erwin G. Krasnow* and *Michael D. Berg* were on the brief for petitioner/intervenor National Association of Broadcasters in 82-1371, 82-1312, 82-1326, 82-1327, 82-1372 and 82-1383. *James J. Popham* also entered an appearance for the National Association of Broadcasters.

Donald A. Kaul, with whom *Shelley R. Grant* and *Edwina Dowell* were on the brief for petitioner/intervenor Spanish International Network, Inc., in 82-1383, 82-1312, 82-1326, 82-1327, 82-1371 and 82-1372.

Grover C. Cooper, *Clifford M. Harrington* and *Richard J. Bodorff* were on the brief, for appellant/intervenor The Christian Broadcasting Network, Inc., in 82-1312, 82-1326, 82-1327, 82-1371, 82-1372 and 82-1383.

John H. Midlen, Jr., was on the brief for petitioner/intervenor Old Time Gospel Hour in 82-1326, 82-1312, 82-1327, 82-1371 and 82-1372.

Bruce G. Forrest, Attorney, Department of Justice, with whom *William Kanter*, Attorney, Department of Justice, was on the brief for appellee/respondent Copyright Royalty Tribunal.

James F. Fitzpatrick, *David H. Lloyd*, *Robert Alan Garrett* and *Vicki J. Divoll* for Major League Baseball, *Philip R. Hochberg* for National Basketball Association, et al., and *Robert Coll* for National Hockey League and *Judith Jurin Semo* for National Collegiate Athletic Association, were on the joint brief for intervenors Major League Baseball, et al., in 82-1312, 82-1326, 82-1327, 82-1371, 82-1372 and 82-1383.

Arnold P. Lutzker was on the brief for intervenor Multimedia Program Productions, Inc., in 82-1312, 82-1326, 82-1327, 82-1371, 82-1372 and 82-1383.

Bernard Korman and *I. Fred Koenigsberg* were on the brief for intervenor American Society of Composers, Authors and Publishers in 82-1312, 82-1326, 82-1371, 82-1372 and 82-1383. *Benjamin L. Zelenko* also entered an appearance for American Society of Composers, Authors and Publishers.

Charles T. Duncan, Michael W. Faber, Joel S. Winnik and *Amy Grossman Applegate* were on the brief for intervenor Broadcast Music, Inc., in 82-1312, 82-1326, 82-1327, 82-1371, 82-1372 and 82-1383.

Malcolm A. Hoffmann was on the brief for intervenor Canadian Broadcasting Corporation in 82-1312, 82-1326, 82-1327, 82-1371, 82-1372 and 82-1383.

Lawrence A. Horn, Jacqueline Weiss and *Gene A. Bechtel* were on the brief for intervenor Public Broadcasting Service in 82-1312, 82-1326, 82-1327, 82-1371, 82-1372 and 82-1383.

Jamie S. Gorelick, David O. Stewart and *Janice F. Hill* were on the brief for intervenor National Public Radio in 82-1312, 82-1326, 82-1327, 82-1371 and 82-1372.

Robert F. Corazzini and *Peter H. Feinberg* for intervenor Superstation, Inc., in 82-1312, 82-1326, 82-1327, 82-1371, 82-1372 and 82-1383.

Before: ROBINSON, *Chief Judge*, WILKEY and MIKVA, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MIKVA.

MIKVA, *Circuit Judge*: Pursuant to the 1976 Copyright Act (the Act), 17 U.S.C. § 101-810 (Supp. V 1981), cable television systems may, by following specified procedures, retransmit certain copyrighted programming to their subscribers without incurring liability for copyright in-

fringement. To avoid liability, however, cable systems must obtain a compulsory license for their operations, in part by paying royalty fees into a central fund (the Fund). This Fund is distributed annually by a federal agency, the Copyright Royalty Tribunal (the Tribunal), among copyright owners whose works were retransmitted by cable. The Tribunal's first distribution determination, for calendar year 1978, was affirmed in almost all respects by this court in *National Association of Broadcasters v. Copyright Royalty Tribunal (NAB v. CRT)*, 675 F.2d 367 (D.C. Cir. 1982). The consolidated cases now before us present various challenges to the Tribunal's second annual distribution, for calendar year 1979. With several important exceptions, we affirm the Tribunal's 1979 determination.

I. Background

The 1976 Copyright Act requires that, each July, every copyright owner "claiming to be entitled to [the] compulsory license fees [deposited in the Fund] shall file a claim with the Copyright Royalty Tribunal. . . ." 17 U.S.C. § 111(d)(5)(A). The Act specifically provides that these claimants, notwithstanding any provision of the antitrust laws, "may agree among themselves as to the proportionate division of [the Fund] . . . [and] may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." *Id.* If, however, after the first day of August of each year, the Tribunal finds that no such agreement has been reached, the Tribunal must declare a "controversy" and conduct a "proceeding" to determine the appropriate distribution of the Fund. *Id.* § 111 (d)(5)(B).

After soliciting comments from copyright owners in October 1980 and hearing arguments at a public meeting one month later, the Tribunal declared the existence of a controversy concerning the distribution of cable royalty

fees for calendar year 1979. *See* 45 Fed. Reg. 71,641 (1980) (directing claimants to file comments); 46 Fed. Reg. 14,153 (1981) (declaring existence of controversy effective Mar. 2, 1981). Shortly thereafter, the Tribunal announced that its 1979 proceeding would be conducted in two separate phases (as had been its 1978 proceeding). Phase I was to allocate percentages of the Fund among various groups of claimants; Phase II was to resolve disputes, if any, among claimants within each group. 46 Fed. Reg. 24,619 (1981).

Following forty-two days of evidentiary hearings, the Tribunal concluded Phase I of its proceedings by allocating the $20.6 million Fund among several claimant groups:

Program syndicators and movie producers	70%
Joint sports claimants	15%
Public Broadcasting Service	5.25%
U.S. television broadcasters	4.50%
Music performing rights societies	4.25%
Canadian television broadcasters	0.75%
National Public Radio	0.25%
Commercial radio	0.00%

46 Fed. Reg. 58,545 (1981) (summary of Phase I). The Tribunal's Phase II proceedings involved, almost entirely, a dispute within the program syndicators and movie producers group. After holding an additional seven days of evidentiary hearings, the Tribunal allocated shares within this group as follows:

Program Syndicators [*and Movie Producers*]:

Motion Picture Association of America	96.8%
Multimedia Program Productions, Inc.	1.6%
National Association of Broadcasters	0.8%
Spanish International Network	0.7%
Mutual of Omaha	0.1%
Christian Broadcasting Network	0.0%
PTL Television Network	0.0%
Old-Time Gospel Hour	0.0%

47 Fed. Reg. 9,879 (1982); *see also id.* (noting existence of minor disputes within the music claimants and U.S. television broadcasters groups that failed to result in any Phase II awards). The Tribunal's rationale for both its Phase I and Phase II determinations was published in the Tribunal's March 8, 1982 Notice of Final Determination, 47 Fed. Reg. 9,879 (hereinafter cited as Decision).

A. *The Positions of the Claimants*

The six cases that now challenge the Tribunal's 1979 Decision can best be understood while identifying the various petitioners and intervenors.

No. 82-1372 is brought by the Motion Picture Association of America (MPAA), a national trade association of major motion picture companies (Metro-Goldwyn-Mayer, United Artists, etc.) which engage in the production and distribution of movies and other programs to television broadcast stations. In this case, MPAA also represents most of the program syndicators (MTM Enterprises, Sandy Frank Film Syndication, etc.) which engage in the business of selling the broadcast rights for television series or movies to a number of broadcast stations. MPAA criticizes the Tribunal for awarding the program suppliers only 70% of the Phase I allocation, especially *vis-à-vis* the Tribunal's awards to the Joint Sports Claimants and T.V. Broadcasters. The MPAA also criticizes the Tribunal's Phase II allocations to program suppliers other than MPAA, but has filed a separate intervenor's brief defending the Tribunal's Phase II allocations to the extent that they went to MPAA.

Nos. 82-1213, 82-1326, 82-1327 are brought by the Christian Broadcasting Network, Old-Time Gospel Hour, and PTL Television Network, owners of syndicated programs with religious themes. These organizations, referred to by the Tribunal as "Devotional Claimants," all object to the Tribunal's failure to award them any percentage at all of the Phase II distribution among program suppliers and movie producers. Although each of

these organizations raises several distinct arguments, all of the Devotional Claimants assert that the Tribunal arbitrarily dismissed their claims for reasons that were not applied evenly to non-religious, but similarly situated, claimants. As a corollary to this argument, the Devotional Claimants maintain that the Tribunal failed to adequately explain its failure to award them any share of the Phase II distribution.

No. 82-1371 is brought by the National Association of Broadcasters (NAB), representing commercial radio and television stations. NAB objects to the Tribunal's Phase I determination on two grounds: (1) its failure to award television broadcasters a share for their "authorship" of sports telecasts; and (2) its failure to make any award to commercial radio. In contrast to these objections, NAB files an intervenor's brief defending the Tribunal's Phase I award of 4.5% to U.S. commercial television and its Phase II award of 0.8% to NAB (for station-syndicated programming) from attack by MPAA and the Devotional Claimants.

No. 82-1383 is brought by the Spanish International Network (SIN), a producer and syndicator of Spanish language television programs. SIN seeks to increase its 0.7% Phase II allocation at the expense of the Tribunal's Phase II award to MPAA. The MPAA's intervenor brief supports the Tribunal's decision not to award SIN a larger allocation. The Devotional Claimants, especially the PTL Television Network (PTL), attack the Phase II award to SIN in light of the Tribunal's failure to allocate a share to PTL for its Club-PTL Spanish language program.

In addition to the intervenor's brief of MPAA and NAB (described above), several other parties have also intervened. The Joint Sports Claimants (JSC), a group that includes the National Collegiate Athletic Association and various professional baseball, basketball, hockey, and soccer leagues, intervenes to defend its Phase I award of

15% from attack by MPAA and NAB. Multimedia Program Productions, Inc., a non-MPAA owner of television series and specials (including *Donahue* and *Young People's Specials*), intervenes to defend its Phase II award of 1.6% from attack by MPAA. The Public Broadcasting Service (PBS) intervenes to defend its Phase I award of 5.25% from attack by MPAA and the Devotional Claimants. Other intervenors are the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), intervening in defense of the Tribunal's Phase I award to the music claimants, and the Canadian Broadcasting Corporation (CBC), which intervenes to criticize the Tribunal's failure to award a share to commercial Canadian radio broadcasters.

Altogether, the petitioners raise a host of procedural and substantive challenges to the Tribunal's 1979 Decision. At the outset, however, there is ample reason to reiterate this court's observation in *NAB v. CRT*:

> it seems clear that these claims are motivated essentially by each petitioners feeling that it deserved a larger share of the Fund. Such reactions flow naturally from the not insignificant consequences of changing one or two percentage points in the distribution of $15 million [$20 million in 1979], and the size of the Fund is expected to grow enormously in future years as cable systems become more widespread.

675 F.2d at 374 (footnote omitted). In the present cases, moreover, many of the parties' positions are further explained by a comparison of the Tribunal's 1978 and 1979 determinations:

1978		1979	
Syndicators & producers	75%	Syndicators & producers	70%
Sports claimants	12%	Sports claimants	15%
T.V. broadcasters	3.25%	T.V. broadcasters (U.S.)	4.5%
Public television	5.25%	Public television	5.25%
Music claimants	4.5%	Music claimants	4.5%
		Canadian broadcasters	0.75%
		National Public Radio	0.25%

See 47 Fed. Reg. 9,879 (1982) (announcing 1979 distribution); 45 Fed. Reg. 63,026 (1980) (announcing 1978 distribution). Thus, for example, MPAA has switched from being a defender of the Tribunal's 1978 determination (75% to producers and syndicators) to being a challenger of its 1979 determination (70% to producers and syndicators). Conversely, JSC now intervenes in defense of the Tribunal's Decision (15% to sports claimants), whereas last year it sought a larger award at the expense of the producers and syndicators (12% to sports claimants). NAB, although criticizing the 1979 Decision in some respects, otherwise praises the Tribunal's sagacity for increasing the award to U.S. television broadcasters from their 1978 percentage.

The parties' manifest self interest does not, of course, diminish their status as petitioners for judicial review of the Tribunal's Decision. We discuss the merits of their claims below. But each claimant's focus on its own slice of the Fund does help to illuminate the complex nature of the task with which the Tribunal was faced. Had each Phase I claimant been awarded its desired allocation, the Phase I distribution would have totalled over 160% of the Fund's available deposits; similarly, satisfying all Phase II claims made by producers and syndicators would have required over 125% of that group's Phase I distribution. These mutually exclusive claims to the $20 million Fund explain, in practical terms, what this litigation is all about.

B. *The Tribunal's Approach*

In evaluating the parties' competing claims to the Fund, the Tribunal operates with very little substantive guidance from Congress. The only limitation in the 1976 Copyright Act is that the Tribunal must restrict its distribution awards to copyright owners "whose work[s] [were] included in a secondary transmission made by a cable system of a *nonnetwork* television program . . .

beyond the local service area of the primary transmitter." 17 U.S.C. § 111(d)(4)(A) (Supp. V 1981) (emphasis added). As we explained in *NAB v. CRT*, this restriction reflects a congressional understanding that copyright owners should be compensated for their inability, due to cable retransmission, to exploit their materials in "distant" markets; because cable retransmission of *network* programming does not weaken the owners' exploitation of distant markets (given that network programming is theoretically available across the country) and because cable retransmission *within* the "local service area" was not felt by Congress to threaten the existing local market for copyright owners, Congress confined the Tribunal's awards to *nonnetwork* programs retransmitted *beyond* the primary transmitter's local service area. *See NAB v. CRT*, 675 F.2d at 373 & n.3 (noting that "local service areas" are defined by the FCC and generally encompass a 100-mile radius). Other than this restriction, however, Congress felt that "it would not be appropriate to specify particular, limiting standards for distribution" of cable royalties, and left the development of distribution criteria to the Tribunal on the basis of "all pertinent data and considerations presented by the claimants." *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess. 97 (1976) (hereinafter cited as House Report).

In its 1979 proceeding, the Tribunal was presented with a welter of conflicting data based on such diverse factors as "television viewing, cable royalty fee generation, attitudinal surveys of cable operators, advertising rates, broadcast station expenditures, economic regression analyses, distant signal programming time, innovative and quality programming and technical equipment." 47 Fed. Reg. 9,892 (1982). After finding that no single formula or rationale provided an adequate basis for allocation, the Tribunal adopted the same five distribution criteria that it had developed in its 1978 proceeding:

The Tribunal determined the primary factors to be:

(a) the harm caused to copyright owners by secondary transmissions of copyrighted works by cable systems,

(b) the benefit derived by cable systems from the secondary transmission of certain copyrighted works, and

(c) the marketplace value of the works transmitted.

The Tribunal determined the secondary factors to be:

(a) quality of copyrighted program material, and

(b) time-related considerations.

Id.; *see* 45 Fed. Reg. 63,035 (1980) (announcing five criteria in 1978 proceeding). In applying these criteria to the 1979 record, however, the Tribunal noted that the "harm" test proved of limited utility because there was little concrete evidence by which to determine that cable retransmission had harmed one group more than any other. *See* 47 Fed. Reg. 9,892, 9,899 n.477 (1982) (parties unable to provide more than "theories" or "anecdotal" evidence of harm). Accordingly, the 1979 Decision focused on those factors that the Tribunal found to appraise more accurately the compensable marketplace value, lost due to cable retransmission, of a claimant's ability to exploit his or her works. In this appraisal, the Tribunal put particular emphasis on two types of evidence. First, the Tribunal found that MPAA's Nielson Report—analyzing the public's viewership of different categories of programming—was the "single most important piece of evidence" in the record, having "probative value in establishing the entitlement of claimants in accordance with some, but not all, of the criteria." *Id.* at 9,892. Second, the Tribunal found that the presentation of the Joint Sports Claimants—emphasizing evidence that cable operators consider sports programming as increasingly important to their ability to attract and retain subscribers—was "structured and presented to focus on the

marketplace considerations we have found most persuasive and useful." *Id.* Because the Nielsen Report and JSC's attitudinal evidence indicated that movies and sports programs contribute overwhelmingly to cable's attractiveness, it is hardly surprising that over 80% of the 1979 distribution was allocated to MPAA and JSC.

II. The Scope of Review

The Tribunal's distribution determinations are subject to the judicial review provisions of the Administrative Procedure Act (APA). *See* 17 U.S.C. § 810 (Supp. V 1981); House Report at 179 ("The amended bill provides for the full scope of judicial review provided by Chapter 7 of the [APA]"). As we indicated in *NAB v. CRT*, the Tribunal's allocations must be neither arbitrary nor capricious and must be supported by substantial evidence. 675 F.2d at 374-75 & n.8. In acknowledging the need for substantial evidence, however, we emphasize that the Tribunal's choice of a particular percentage allocation is not reviewable for exact precision, but simply for rationality; we are without power to set aside a particular percentage allocation provided that it is within a "zone of reasonableness." *Id.* at 374 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968)); *accord Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) ("To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the Commission").

We also recognize that, in evaluating the adequacy of the Tribunal's articulation of its bases for decision, we must not confuse form with substance. Our task is not to insist that the Tribunal express itself as elegantly as possible. *Cf. National Cable Television Association v. Copyright Royalty Tribunal*, 689 F.2d 1077, 1087 n.74 (D.C. Cir. 1982) (excusing Tribunal's lack of clarity in light of its almost complete lack of staff). Rather, we review the adequacy of the Tribunal's explanations to ensure

that the agency has genuinely engaged in reasoned decisionmaking. Accordingly, as we stated in *NAB v. CRT*, the Tribunal's findings will be upheld, though of less than ideal clarity, if the path which the agency follows can reasonably be discerned. *See* 675 F.2d at 376 n.10; *accord Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945); *Recreation Vehicle Industry Ass'n v. EPA*, 653 F.2d 562, 572 n.78 (D.C. Cir. 1981); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (DC. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

To these well-established standards of judicial review, we add a caveat regarding challenges to the Tribunal's failure to award several claimants any shares of the Fund at all. To the extent that the Tribunal's non-awards are based on the record evidence (or lack thereof), it is appropriate to review the Tribunal's decision with particular care. Although we have held squarely that the Act does not compel awards to all claimants, *NAB v. CRT*, 675 F.2d at 380, the Tribunal itself has recognized that the Act presumes copyright owners to suffer some detriment arising from the retransmission of their works by cable into distant markets, *see* 47 Fed. Reg. 9,892 (1982); 45 Fed. Reg. 63,035 (1980). *See generally* House Report at 90 (congressional assumption that cable retransmission impairs copyright owner's ability to exploit distant markets). We do not quarrel with the Tribunal's finding that there is little concrete evidence in the 1979 proceeding to prove the relative degrees of detriment among groups of claimants, thereby reducing the utility of the "harm" test as an allocational device. But we will scrutinize carefully, within the limited scope of our review under the APA, the Tribunal's determination that a claimant's retransmitted works are of such negligible marketplace value and/or of such negligible benefit to cable operators that no award at all is reasonable.

III. Individual Claims

A. *No. 82-1372, MPAA v. Tribunal*

MPAA, on behalf of numerous producers and syndicators, claims that program suppliers as a group are entitled to more than their 70% Phase I award and that MPAA, in particular, should receive more than its 96.8% Phase II share. The thrust of MPAA's case is that the Tribunal failed to explain adequately, or to adduce substantial evidence for, its awards to program suppliers and MPAA vis-à-vis other claimants. Specifically, MPAA attacks the Tribunal's Phase I allocations to JSC and NAB and its Phase II allocations to Multimedia, NAB, and SIN. In light of the whole record of the 1979 proceeding, however, we affirm the Tribunal's distributions.

In general, we have little difficulty in discerning the "path" followed by the Tribunal in its various Phase I awards. The Tribunal's allocation to program suppliers largely reflected the "hard numbers" in MPAA's Nielsen Report, on which program suppliers had based a claim to 80.5% of the Fund, as adjusted downward to 70% for (1) the possibility of certain methodological weaknesses in the Report, and (2) independent evidence from JSC and NAB that their programming was of relatively greater benefit to cable operators in attracting subscribers than was MPAA's. *See* 47 Fed. Reg. 9,892-94 (1982). The Tribunal adequately explained, and supported, its reasons for following this approach.

> A major reason for the Tribunal being unable to accord the Nielsen "hard numbers" the weight urged upon us by MPAA is that we share the views advanced by certain other claimants, notably Joint Sports and NAB, that cable operators are interested in selling subscriptions and that viewership [which the Nielsen Report measures] is of limited relevance to cable operators.
>
> In assessing the weight to be accorded the Nielsen Report we have also considered the evidence as to the

> methodology of the study, the selection of the station sample on a fee generated basis previously found deficient by the Tribunal, the use of "sweep periods," and the role of MPAA in the design and execution of the survey.

Id. at 9,892; *see id.* at 9,882-83, 9,885 (pertaining to attitudinal surveys of cable operators); Sports Exhibits 19-24, CRT Docket 80-4 (pertaining to methodology and design of Nielsen Report).

MPAA objects to the wording of several passages in the Tribunal's Decision. Our search for a discernible path of reasoned decisionmaking, however, should not be confused with hypertechnical scrutiny of an agency's phraseology. In light of the purpose for which we review an agency's explanations, and the different evidentiary records in the Tribunal's 1978 and 1979 proceedings, we find the Tribunal's rationale for its 1979 allocation to program suppliers to be at least as indicative of reasoned decisionmaking as was its rationale (defended vigorously by MPAA last year) for the program suppliers' 1978 allocation.

In affirming the Tribunal's 1979 allocation, we reject MPAA's argument that the Tribunal's general approach was undermined by the program suppliers' evidence of "harm." The Tribunal explained, by explicit reference to the proposed evidentiary findings of two other claimants, that "there is little concrete evidence of record with regard to the Congressional presumption of harm, although a number of parties have tendered evidence and arguments concerning theories and 'anecdotal' instances of what they believe to be harm. . . ." 47 Fed. Reg. 9,899 n.477 (1982) (incorporating proposed findings of JSC and Public Broadcasting). It is well established that an agency may explain itself by incorporating by reference parts of the record, *see NAB v. CRT*, 675 F.2d at 376 n.10, and, in this instance, the Tribunal's desire to downplay comparisons based on relatively imprecise, "anec-

dotal" evidence adequately explains why it chose not to magnify much of the program suppliers' evidence of harm. *See, e.g.*, JA 1,565 (testimony of Mr. Valenti, President of MPAA) ("From a qualitative viewpoint, just a couple of quotes. I scribbled down—see the scribbles—a couple of quotes from our salesman"); JA 1,243 (testimony of Mr. Horn, President of Tandem/T.A.T.) (referring to personal conversation with salesman comparing sales to television serials in heavily- and lightly-cabled markets).

Nor are we persuaded by MPAA's charge that the Tribunal inadequately explained and justified its specific Phase I awards to JSC and NAB. JSC presented evidence that cable operators perceive sports programming to account significantly for the ability of cable systems to attract and retain subscribers; in part, this evidence was adduced through the direct testimony of several cable operators and, in part, through an industry-wide survey similar to one which JSC had introduced in the 1978 proceeding (the BBDO survey). Although the Tribunal acknowledged that this "attitudenal [sic] evidence cannot be the sole basis of . . . allocation," it noted that adjustments had been made in the 1979 BBDO survey to correct certain methodological deficiencies, and concluded that "the trends reflected in the 1978 and 1979 BBDO studies . . . [lend] support for a finding that cable operators assign a declining value to distant signal carriage of movies with a corresponding rise in the value of sports." 47 Fed. Reg. 9,882, 9,893 (1982). MPAA argues that the Tribunal's reasons for relying on this attitudinal evidence—in lieu of the "direct" evidence of viewership measured in MPAA's Nielsen Report—is nowhere explained. We disagree. The Tribunal expressly stated that, "[a]s in the 1978 royalty proceeding, the direct case of the Joint Sports claimants was structured and presented to focus on the marketplace considerations we have found most useful." *Id.* at 9,892. Given that JSC's 1978 pre-

sentation was designed to reflect "how the cable industry would have allocated its royalty dollars if it had been required to bargain about compulsory licensing," 45 Fed. Reg. 63,029 (1980), we find the Tribunal's reiteration of these marketplace considerations in its 1979 Decision to be adequately explained. Indeed, given Congress' evident intent to have the Tribunal operate as a substitute for direct negotiations (which were thought to be impractical) among cable operators and copyright owners, *see* House Report at 89, we find the Tribunal's receptiveness to evidence simulating the commercial attitudes of the "buyers" in this supplanted marketplace to be more than reasonable.

Although we also affirm the reasonableness of the Tribunal's Phase I allocation to NAB, we are not as sanguine about the quality of the Tribunal's explanation. NAB's award was intended to compensate television broadcasters for the retransmission by cable of certain "local" broadcasts, such as station news and public affairs programming, to relatively nearby (though technically "distant") communities. In support of its Phase I claim, NAB presented testimony from cable operators and a survey of cable subscribers indicating the benefit of local broadcasts to cable systems; evidence concerning the relatively high percentage of commercial "distant" signals originating less than 150 miles from the cable community; and, in particular, a study of the amount of time allocated to local broadcasts retransmitted by cable. *See* 47 Fed. Reg. 9,883-84 (1982). In contrast to NAB's presentation in the 1978 proceeding—which provided no evidence of local broadcasting's benefit to cable; was supported almost entirely by a mechanistic time-based formula; and was characterized by the Tribunal as having left the record in "a state of utter confusion and disarry [sic]"—NAB's 1979 presentation was praised by the Tribunal for having been made "in an effective and coherent manner." *Compare* 45 Fed. Reg. 63,038 (1980)

(discussing 1978 presentation) *with* 47 Fed. Reg. 9,893 (1982) (discussing 1979 presentation). Despite this compliment, however, the Tribunal adopted by reference the views of several claimants that NAB's 1979 presentation had merely repeated NAB's time-based 1978 case, and furthermore stated that its review of the 1979 record had not caused it "to alter the basic conclusion we reached in the earlier [1978] proceeding." 47 Fed. Reg. 9,893 (1982). Although the Tribunal next acknowledged specifically the new evidence introduced by NAB for 1979, it stated that a review of the 1979 record left it unpersuaded that local broadcasting was "of more than marginal value to cable operators, or a significant factor in the decision of the public to subscribe to a cable system." *Id.* Finally, the Tribunal concluded that NAB's 1979 award should reflect a "downward adjustment of the 'hard numbers,' whether viewed from either the NAB perspective of total programming hours [the time-based evidence] . . . or the time and viewing data of the program syndicators [the Nielsen Report]," but then, paradoxically, announced that NAB would receive for U.S. broadcasters a 1.25% *increase* over its 1978 Phase I award of 3.25% (which had even included an award for Canadian broadcasters).

Faced with such a tortured explanation of NAB's award, we appreciate the vigor of MPAA's request to vacate and remand this aspect of the Tribunal's Decision. Nevertheless, even the inartful author of this section of the Decision has not been able to camouflage completely the discernible and defensible path of the Tribunal's allocation. In context, we take the Tribunal's criticism of NAB's time-based evidence, and the Tribunal's conclusion that local broadcasting is of only "marginal" value, to explain why NAB's original claim to 12.7% to 17.2% of the entire Fund was significantly overblown. Similarly, we understand these deficiencies in NAB's case to justify a downward adjustment in the 19% time and 8% view-

ing percentages, attributed to local broadcasting, in the Nielsen Report. *See* 47 Fed. Reg. 9,881 (1982) (Nielsen breakdown for local broadcasting). But, given that the Tribunal has identified these Nielsen percentages as "the single most important piece[s] of evidence in the record" and "a useful 'starting point' for the application of the criteria to the record evidence," *id* at 9,892, the Tribunal was compelled to recognize that the "marginal" value of local broadcasting to cable systems was not quantitatively *de minimis*. Although our review of an agency's explanation does not permit us to "guess" at its thinking, *Greater Boston Television Corporation*, 444 F.2d at 851, we conclude that the Tribunal's award of 4.5% to NAB was adequately explained to be within the "zone of reasonableness" bounded by the Nielsen "hard numbers," on the one hand, and the Tribunal's appraisal of NAB's case-in-chief, on the other. In affirming the Tribunal's allocation, however, we take this opportunity to paraphrase an admonition previously given by this court to the Tribunal:

> While we do not sanction [the quality of the Tribunal's explanation], we have regarded [it] charitably in light of the Tribunal's lack of a professional staff and the [relative] novelty of the proceeding. We expect the quality of the Tribunal's decisionmaking to improve with experience.

National Cable Television Association v. Copyright Royalty Tribunal, 689 F.2d 1077, 1091 (D.C. Cir. 1982) (Bazelon, J.). The time for improvement is now.

Finally, we consider MPAA's challenge to the Tribunal's Phase II allocation among program suppliers. Although we evaluate below additional challenges to the Phase II proceeding by the Devotional Claimants and SIN, we address here MPAA's claim that its 96.8% Phase II share is unjustifiably small in light of the Tribunal's awards, alleged to have been made without sufficient evidentiary support, to Multimedia Program

Productions, Inc. (1.6%), NAB (0.8%), and SIN (0.7%). We reject MPAA's claim.

In Phase II, MPAA represented a group of fifty-eight program suppliers which had voluntarily agreed to divide among themselves 98.5% of the program suppliers' Phase I allocation. MPAA asserts that the Tribunal's award to MPAA of only 96.8% necessarily represents a penalty, imposed on the fifty-eight cooperating suppliers for having reached an agreement. This assertion is groundless. Not only did the Tribunal indicate that it "welcomes voluntary agreements," 47 Fed. Reg. 9,895 (1982), but it indicated generally why the aggregate, Phase I-type evidence relied upon by MPAA in Phase II was marginally less probative of the Tribunal's five allocational criteria than was the more individually-tailored evidence of Multimedia, NAB, and SIN, *see id.* Although the Tribunal certainly could have been more specific in its evaluation of MPAA's aggregate evidence, as well as more specific in its identification of the evidence on which it based its competing awards to Multimedia, NAB, and SIN, we cannot say that, considering the record as a whole, the Tribunal's allocations were outside an identifiable zone of reasonableness. Specifically, we note that Multimedia's 1.6% award can be justified by evidence in the record indicating the value to cable of its *Donahue Show* and *Young People's Specials*, *see id.* at 9,888, as discounted by *Donahue*'s wide availability on local television stations, *see id.* at 9,895. NAB's award (as a syndicator of station programming) of 0.8% can be justified by what the Tribunal characterized as a "minimal" evidentiary showing that station-syndicated programming is of value to cable because it is generally not as widely distributed as other syndicated programs and because of its "intrinsic value, timeliness, and freshness." *See id.* at 9,896. And SIN's award of 0.7% can be justified despite the acknowledged insufficiencies in SIN's case-in-chief (discussed *infra*), by evidence that cable

operators' payments for SIN's programming often reflect the fact that SIN represents the exclusive Spanish-language signal within certain primary areas. *See id.* at 9,889.

For the reasons discussed above, MPAA's petition for review of the Tribunal's Phase I and Phase II allocations is denied.

B. *Nos. 82-1213, 82-1326, 82-1327, Devotional Claimants v. Tribunal*

The Christian Broadcasting Network (CBN), Old-Time Gospel Hour (OTGH), and PTL Television Network (PTL) are the copyright owners of television programs with varying degrees of religious themes. CBN, for example, is the producer and syndicator of twenty-two programs, the most widely known of which is *The 700 Club*, a daily program that typically consists of "55½ minutes of public affairs material, 8 minutes of entertainment, and 7½ minutes of religion." CBN Brief at 25. PTL produces and distributes two live, daily "talk-music-entertainment" programs, the *PTL Club* and the Spanish language *Club PTL*. PTL Brief at xii. OTGH produces and distributes a weekly, one-hour Sunday Service, *The Old-Time Gospel Hour*, conducted by Reverend Jerry Falwell. Despite the differences among their programs, CBN, PTL, and OTGH share several common organizational and financial attributes. Each of these organizations, for example, distributes its programs to broadcasting stations with the understanding that no commercial interruptions are to be allowed. Perhaps for this reason, each of these organizations pays broadcasters to air the programs—reversing the usual arrangement in which the *broadcaster* pays the producer/syndicator for a program and then capitalizes on the program through the sale of advertising time. Another common attribute is the CBN, PTL, and OTGH all use their programs as vehicles for soliciting donations; indeed, each of these organizations

finances its production and distribution costs entirely from viewer contributions.

In addition to the distribution of their programs through broadcasting stations, CBN and PTL also distribute their programs over their own twenty-four-hour satellite programming services. These services relay a variety of programs, including some CBN- and PTL-produced programs, directly to cable stations for retransmission (over the cables) to subscribers. Although, in operating their satellite networks, CBN and PTL relay their own programs without commercial interruption, they do attempt to sell advertising time for the other programs. In addition to distribution by satellite, CBN distributes its programs through four commercial broadcast stations (in Atlanta, Boston, Dallas, and Portsmouth (Va.)) owned by CBN Continental Broadcasting, Inc., a CBN subsidiary.

CBN, PTL, and OTGH each presented separate cases before the Tribunal. Perhaps because of the similarities among these three program suppliers, however, the Tribunal treated them as a group, the "Devotional Claimants," to which it made no award in the Phase II distribution among producers and syndicators. Although, on appeal, these claimants continue to argue independently, we shall evaluate first their overlapping objections to the Tribunal's "group" decision before discussing, briefly, several more particular objections raised individually in the briefs. Because we are not satisfied that the Tribunal's treatment of the Devotional Claimants reflects reasoned decisionmaking, we remand this aspect of the Phase II distribution for redetermination.

1. *The Tribunal's "0" Award*

The Tribunal gave two reasons for denying the Devotional Claimants an award. First, it found that devotional programming had no marketplace value (one of

the three primary criteria) because its producers had to pay broadcasters to air it. In the Tribunal's words:

> We regard it as a *fundamental distinction* the practice of these syndicator claimants to buy time on television stations to broadcast their programs, while other syndicated programs are purchased by the stations.

47 Fed. Reg. 9,896 (1982) (emphasis added). Second, and subordinately, the Tribunal found that the Devotional Claimants are not "harmed" by cable retransmission of their programming (another of the Tribunal's original criteria), and indeed may benefit from it because the expanded viewing audience could provide a source of additional donations:

> Although, as discussed elsewhere, we have not found the evidence on the harm criteria to provide much assistance in allocating royalty shares, cable carriage may well benefit these claimants because the expanded carriage provides greater exposure and the potential of increased contributions from viewers. The record establishes that these claimants rely upon direct contribution for the support of the programs and other activities.

Id. Although the Tribunal's explanations appear at first blush to be perfectly reasonable, they take on an air of unexplained arbitrariness when measured against the evidentiary record of the 1979 proceeding and the Tribunal's dissimilar treatment of claimants which, in several respects, seem similarly situated to the Devotionals.

We begin by reiterating that there is nothing necessarily irrational about the Tribunal's "fundamental distinction;" the fact that CBN, PTL, and OTGH pay broadcasters to air devotional programming provides, as a matter of logic, the basis for a reasonable inference that their programming is without recognizable market value. But while we do not criticize the Tribunal's abstract logic,

the Tribunal completely fails to acknowledge (much less discuss) record evidence suggesting factual weaknesses in its neat conclusion. For example, nowhere does the Tribunal discuss the contention—repeatedly pressed by the Devotional Claimants—that their payments to broadcasters reflect a conscious, self-inflicted cost of commercial-free formatting rather than any external indication of market worthlessness. *See, e.g.*, Tribunal Summary of PTL's Evidentiary Position, 47 Fed. Reg. 9,890-91 (1982) ("Religious programmers choose not to mix advertising with their programming in order to retain freedom of expression"); CBN Exhibit 1, JA 450-51 ("Interspersing such programs with product commercials would be as offensive and out of place as billboards in a church or synagogue"). Nor does the Tribunal acknowledge the merits of a counterargument, also pressed repeatedly by the Devotional Claimants, that the market value of their programming is reflected in the "value viewers place on it in that they are willing to pay to support it [through donations]." Tribunal Summary of CBN Evidentiary Position, 47 Fed. Reg. 9,890 (1982); *cf.* Tribunal Summary of PTL Evidentiary Position, *id.*, at 9,891 (making same point to proffer evidence of "quality"). These failures, by themselves, may not necessarily vitiate the Tribunal's "fundamental distinction"—"[s]ubstantial evidence is not lacking merely because the agency chooses one conclusion from evidence that arguably supports 'two inconsistent conclusions.'" *NAB v. CRT*, 675 F.2d at 367 (quoting *Consolo v. FMC*, 383 U.S. 607, 620 (1966)). But the Tribunal's conspicuous failure to discuss these relevant aspects of the Devotional Claimants' case makes it difficult for us to appraise the reasonableness of the Tribunal's response to the record evidence.

Moreover, troubling indications of arbitrariness arise when, in considering the cases of Public Broadcasting Service (PBS) and National Public Radio (NPR), the tri-

bunal felt free to make awards to claimants *regardless* of "commercial marketplace factors." 47 Fed. Reg. 9,893 (1982) (making 5.25% Phase I award to PBS); *id.* at 9,894 ("As with our review of the PBS claim, some customary guides to judging the marketplace value of program product are not useful. The record supports a finding that the programming has a special appeal, which justifies an award") (making .25% Phase I award to NPR). And even more specific indications of arbitrariness are suggested by the Tribunal's Phase II recognition (albeit only on the order of a .1% award) to Mutual of Omaha for *Wild Kingdom*—despite the Tribunal's acknowledgment that Mutual of Omaha "barters" its program to broadcasters (i.e., receives no money for it), uses the program as an "advertising vehicle," and "receives some benefit" from cable retransmission. *Id.* at 9890, 9896. Measured in light of these awards, the Tribunal's "fundamental distinction" begins to take on the texture of quicksilver.

Tell-tale indicators of capriciousness become more apparent when we turn, as the Tribunal did not, to the "benefit to cable systems" criterion: the criterion which, in discussing the Joint Sports Claimants' presentation, the Tribunal included as among "the marketplace considerations we have found most persuasive and useful." 47 Fed. Reg. 9,892 (1982). In its analysis of the Devotional Claimants' presentations, however, the Tribunal felt it unnecessary to discuss what appears to be at least noteworthy record evidence of "benefit to cable operators." *See, e.g.*, Letter from Ronald Roe, Hampton Roads Cablevision, to Pat Robertson, CBN (Jan. 6, 1982) ("your program [*700 Club*] has attracted a very loyal and dedicated audience that appears to be gradually increasing all the time"); Testimony of Walter Richardson, Vice President of Affiliate Marketing, PTL, Transcript (Tr.) 6922, JA 1674 (31 "cable affiliates" specifically subscribe to PTL satellite service); Testimony of Stanley Ditchfield, former CBN Executive, JA 459 (identifying

apparently extensive cable retransmission of CBN-owned station KXTX-TV, which devoted 18.5% of its operating time to CBN programming); *id.*, at 458 (indicating notable percentage of stations qualifying as FCC "specialty" stations that carried CBN programming); Testimony of former FCC cable TV attorney and present MPAA attorney, Tr. 3844, JA 2171 ("Q: There is a benefit [to cable systems from carrying a specialty station] or they wouldn't carry it, is that correct? A: Of course"). While we do not necessarily interpret this evidence to require an award to the Devotional Claimants, the evidence does seem similar to that upon which the Tribunal appears to have elsewhere based awards. *See, e.g.*, 47 Fed. Reg. 9,893 (1982) (crediting testimony of individuals in cable industry regarding JSC's claim to benefit); *id.* (identifying cultivation by PBS of "target" audience to be of benefit to cable); *see generally* Decision at 9,896 (awarding SIN 0.7% despite "serious evidentiary deficiencies"); *id.* at 9,900 (justifying 0.25% award to NPR based on "slight" benefit from carriage by cable). In the absence of any discussion of this apparently relevant evidence, the Tribunal's non-award to the Devotional Claimants suggests an element of arbitrariness in the Tribunal's decisionmaking.

Finally, we come to the Tribunal's "harm" criterion and, specifically, to the Tribunal's conclusions that Devotional Claimants (1) may well "benefit" (a negative harm) from cable retransmission; (2) cannot claim harm for any interest involving their satellite services; and (3) are not harmed due to fractionalization of their local audiences. Although we do not find implausible the Tribunal's supposition that cable retransmission "may well benefit" the Devotional Claimants' contribution base, we are troubled by the unexplained vengeance with which the Tribunal seems to have applied this factor to CBN, PTL, and OTGH. At the outset, we note that the Tribunal did not determine the actual extent to which these

claimants might be benefitted; accordingly, the Tribunal's notable reliance on this plausible—yet unquantified—presumption of benefit seems to run counter to the very reason given by the Tribunal for discounting use of the "harm" criterion in general. *See* 47 Fed. Reg. 9,896 & n.477 (1982) (downplaying harm criterion in 1979 Decision because "none of the parties have been able to provide proof of harm with that degree of precision that an administrative agency might desire"). Indeed, the Devotional Claimants introduced evidence into the record (not discussed by the Tribunal) to suggest that the net benefit from cable to their fundraising efforts may be relatively moderate. *See, e.g.*, Tribunal Summary of PTL Evidentiary Position, 47 Fed. Reg. 9,891 (1982) (stations which know their signals are being retransmitted by cable charge PTL higher broadcasting rates); Tribunal Summary of CBN Evidentiary Position, *id.* at 9,890 (overexposure by cable importation damages local donors' willingness to contribute because they feel CBN is wasting money on duplicative programming). Even more troublesome, however, is the unevenness with which the Tribunal's presumption of benefit seems to have been applied. For example, the Tribunal made Phase I awards to PBS and NPR without any discussion of these claimants' on-the-air fundraising, and made a Phase II award to Mutual of Omaha after affirmatively noting that Mutual of Omaha received "some [advertising] benefit from distant carriage." *Id.* at 9,896. The reasons why the "benefit from cable" factor completely foreclose the Devotional Claimants from *any* award are never presented. Given that "the single most important piece of evidence in the record," MPAA's Nielsen Report, recorded a small (but measurable) 1% viewing rating for devotional series, *id.*, at 9,881, we think that a more adequate explanation for a complete non-award was necessary.

Before discussing the Devotional Claimants' "satellite" and "fractionalization" arguments, it is necessary to identify briefly why the Devotional Claimants may be, at

least on a conceptual level, less "fundamentally" distinct than the Tribunal seems to have supposed. We start from the observation that these claimants, like others, are copyright holders who attempt to exploit the economic value of their works. To be sure, their marketing strategies (and long-range aspirations) differ from those of most other claimants: rather than sell their programs to broadcasters for the programs' advertising values, the Devotional Claimants buy television time and use the value of their programs to solicit contributions from viewers. It may well be that, as a factual matter, cable retransmission will affect these two marketing systems differently; and we do not discount the possibility that the economic benefit of cable to the Devotional Claimants' system may outweigh its economic harms. But in making this determination, it is certainly the Tribunal's obligation to consider all legally-cognizable evidence of economic harm placed before it by the parties.

This observation becomes important in evaluating the Tribunal's treatment of CBN's and PTL's argument that cable harms their satellite programming services. Specifically, these Devotional Claimants maintained that the availability of their programs on cable made it difficult (1) for CBN and PTL to place their satellite networks with other, competing cable systems (which may have felt, for instance, that their area already had "enough PTL"), and consequently (2) made it that much less likely for their programs to be shown during prime time, when viewership and potential contributions are at their maximum (CBN and PTL can almost never afford to buy prime time for their programs from commercial broadcasters, but both claimants schedule their own programs during prime time on their satellite networks). To both of these arguments, the Tribunal responded:

> Whatever the situation may be, we hold that any harm suffered by a satellite network, whether or not the harm can be linked to distant signal importation,

> is not a harm for which the Tribunal can provide compensation under the provisions of Section 111 of the Copyright Act.

47 Fed. Reg. 9,896 (1982). We think that the Tribunal's interpretation of the Act was partly, but not entirely, correct. To the extent that the Tribunal refused to recognize general revenue loss from these claimants' inabilities to "place" their satellite networks—beyond the specific, marginal loss of prime time contributions from their copyrighted programs—we agree. As CBN itself admits, "The distribution process focuses on harm to copyright owners in their capacity as copyright owners, not on injury to broadcasters . . . who may incidentally be copyright owners . . . ." CBN Reply Brief at 29. By the same reasoning, the Act does not envision royalty fee distribution to satellite network owners for harm to their networks, simply because these owners may incidentally hold valid copyrights to some of their networks' programming. But to the extent that the Devotional Claimants can prove (to the Tribunal's satisfaction) that cable retransmission has measurably diminished their ability to exploit the contribution potential of their particular works, whether by satellite or otherwise, we see no reason why such an opportunity loss would fall outside the scope of section 111 of the Act. *See* House Report at 90 (emphasizing desire to compensate copyright holders for cable's adverse affects on owner's ability to exploit work in distant markets). Although it appears to us that proving such an attenuated loss would be extremely difficult, competent evidence of such a harm would not be beyond the power of the Tribunal to evaluate.

Similarly, we find the Tribunal authorized to consider evidence of economic harm due to fractionalization—the splitting of a program's local audience because of distant signal importation of other programs. In response to an argument by OTGH that fractionalization of its audience by cable importation forces it to pay more for station

time (allegedly because the station loses some of the "lead time" value of OTGH to the next program), the Tribunal responded:

> We have also not found convincing the theory advanced by OTGH that we should distribute royalty fees to compensate it for alleged harm resulting from fractionalization of its audience because of distant signal importation of other programs.

47 Fed. Reg. 9,896 (1982). To the extent the Tribunal's decision reflects an evaluation of OTGH's evidence of loss, it stretches our tolerance of even those "vague" or "summary" findings sanctioned in *NAB v. CRT*, 675 F.2d at 376 n.10. To the extent the Tribunal's decision reflects its rejection of OTGH's entire "theory" of harm, we find it difficult to reconcile with the Tribunal's original explanation of "harm" announced in its 1978 determination: "It is also our opinion, as reflected in the record, that there is a further adverse economic impact on a copyright owner from the importation of competing distant works into the aggrieved party's local community." 45 Fed. Reg. 63,035 (1980). Our inability to tell which of these two possibilities the Tribunal meant to express only highlights the reason we are forced to remand this aspect of the Decision back to the agency.

2. *Miscellaneous Challenges*

We do not base our remand on any of the other various legal and procedural challenges advanced by the Devotional Claimants on appeal. First, we reject the contention that all bona fide copyright owners whose works were retransmitted by cable are entitled to an award as a matter of law. As we stated in our decision in *NAB v. CRT*, the Act envisions the need for copyright holders to qualify for distribution of the Fund. 675 F.2d at 380. In light of Congress' evident intent to leave the development of "particular, limiting standards for distribution"

to the Tribunal, House Report at 97, we have affirmed the Tribunal's five allocational factors as a reasonable interpretation of legislation by the agency charged by Congress with its enforcement. *NAB v. CRT*, 675 F.2d at 380; *see generally FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). It is for the Tribunal, and not each claimant, to determine in the final analysis whether (and to what extent) a particular claim satisfies these allocational criteria.

Nor do we find that the Tribunal was "locked into" making an award to the Devotional Claimants in Phase II, after having initially granted a 70% Phase I distribution to the "Motion Picture Association of America and other program syndicators *including claimants for syndicated religious programs* . . . ." 46 Fed. Reg. 58,545 (1981) (emphasis added). Although we remanded such a change of course (concerning an award to NPR) in *NAB v. CRT*, we emphasized in that decision that our remand was based entirely on the fact that the Tribunal's rescission of NPR's Phase I allocation occurred in procedurally infirm proceedings that violated the Tribunal's own public meeting requirements. *See* 675 F.2d at 384-85. No such procedural irregularity occurred in the Tribunal's 1979 Decision. Although, as we have emphasized, the Tribunal's explanation for its non-award to the Devotional Claimants in Phase II was inadequate, the Tribunal was not legally foreclosed from reevaluating the Phase I record for Phase II purposes. *See* 47 Fed. Reg. 9,895 (highlighting differences between Phase I and Phase II proceedings). If on remand, however, the Tribunal continues to maintain its current Phase II non-award, it must adequately explain "why it [chose] to reject the reasoning of its initial decision," *National Association of Food Chains, Inc. v. ICC*, 535 F.2d 1308, 1318 (D.C. Cir. 1976), especially in light of the Tribunal's Phase II award to MPAA based entirely on MPAA's Phase I evidence, *see* 47 Fed. Reg. 9,895.

The Devotional Claimants assert that other procedural irregularities occurred in the 1979 proceeding. In general, they maintain that the Tribunal failed to determine that its awards were made to proven copyright owners and, in particular, that the Tribunal allocated royalty fees to claimants which failed to satisfy the Tribunal's minimal filing requirements, *see* 37 C.F.R. § 302.3 (1982). Although these assertions correctly indicate that several "technical" filing imperfections surfaced fairly late in the 1979 proceeding, we do not interpret the Tribunal's decision as having overlooked these problems. Rather, the Tribunal stated that it had applied its rules (albeit "flexibly") in light of the record evidence; specifically, the Tribunal found that "evidence in this record establishes that programs of each of the claimants with defective claims were carried as distant signals," and further stated that it had not awarded cable fees to claimants "which did not submit adequate entitlement justification." 47 Fed. Reg. 9,895, 9,987 (1982). Although the Devotional Claimants suggest certain theoretical difficulties with the Tribunal's approach, *see, e.g.*, JA 1633-34 (suggesting that 20% of movies may "potentially" now be in the public domain), there is substantial evidence in the record to support the Tribunal's conclusion that its awards went only to bona fide copyright owners, *see, e.g.*, Record of Proceeding, Jan. 19, 1982, at 58-60 (supporting reasonableness of MPAA's assumption that, in the absence of any claims of fraud, syndicators or producers were copyright owners or represented rightful owners). Finally, we reject OTGH's claim that the Tribunal's proceedings took longer than the one-year time period statutorily imposed by 17 U.S.C. § 804(e) (Supp. V 1981). The Tribunal rendered its final 1979 Determination on March 2, 1982—precisely one year after the effective date of its Federal Register notice announcing that proceedings had begun. *See supra*, page 2. OTGH indicates that "[s]omebody at the Office of the Federal Register was more efficient than the Tribunal expected"

and the notice (with a stated effective date of March 2, 1981) was actually published on February 26, 1981. OTGH Brief at 13-14. But we decline to hold that Congress' one-year period of decisionmaking was violated by the efficiency of the Office of the Federal Register; it is to the specified "effective date" of the Tribunal's 1981 Notice that we give legal significance. *Cf. Interstate Natural Gas Association of America v. FERC*, No. 81-1690 *et al*, slip op. at 12 (D.C. Cir. Aug. , 1983) (Natural Gas Policy Act became law on November 9, 1978 but with an "effective date" of December 1, 1978).

For the reasons discussed above, the petitions of CBN, PTL, and OTGH are granted in part and denied in part, and the Tribunal's Decision remanded for further proceedings consistent with this opinion.

C. *No. 82-1383, SIN v. Tribunal*

SIN challenges the Tribunal's rejection of a "fee-generated" formula for awarding distributions. By using such a formula, which links the distribution of royalty fees to the amount of fees paid into the Fund, SIN claims that it is entitled to a larger Phase II award for its Spanish language programming. SIN also challenges the Tribunal's Phase II award to MPAA, as did the Devotional Claimants, for having been made without proper regard to copyright ownership. Because neither of these arguments provides a defensible reason for upsetting the Tribunal's Decision, we affirm the Tribunal's allocation to SIN.

To begin, we reject SIN's contention that the Tribunal was obligated to issue a general rule on the validity *vel non* of fee-generated methodologies; the Tribunal is under no obligation to proceed by general rulemaking. *See SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947); *Trans-Pacific Freight Conference v. Federal Maritime Commission*, 650 F.2d 1235, 1244 (D.C. Cir. 1980), *cert. denied*, 451 U.S. 984 (1981). It is sufficient that the Tri-

bunal explained that it chose not to address the general validity of fee-generated formulas because "the record establishes that the formula presented by SIN contains such incomplete and unreliable data that it could not be utilized for distribution purposes, regardless of what conclusion we might reach as to its rationale." 47 Fed. Reg. 9,896 (1982). The Tribunal's position is supported by substantial evidence in the record. *See, e.g., id.* ("It has been established that SIN does not own approximately 40% of the program"); JA 9440 (SIN's definition of "primary market zone" was conceded to bear no relation to the definition established in FCC rules); JA 9358, 9431 (indicating that SIN's studies were judged by SIN to justify, at various times, such inconsistent distributions as $184,384; $210,000; and $311,000).

We also reject SIN's challenge to the Tribunal's award to MPAA. SIN raises virtually the same objections—regarding copyright ownership—as were raised by the Devotional Claimants. As we explained in our discussion of Nos. 82-1213, 82-1326, and 82-1327, however, such a challenge cannot withstand scrutiny. *See supra* pages 33-34. Moreover, as we explained in our discussion of No. 82-1372, *supra* pages 13-21, the reasonableness of the Tribunal's allocations to both MPAA and SIN are supported by substantial evidence. Accordingly, for the reasons stated in these earlier aspects of our decision, as well as for those reasons added above, we affirm the Tribunal's 0.7% Phase II allocation to SIN.

D. *No. 82-1371, NAB v. Tribunal*

As a final matter, we consider two arguments advanced by NAB. First, on behalf of television broadcasters, NAB seeks reversal of the Tribunal's conclusion that no Phase I award could legally be accorded television broadcasters for the value of their contribution to sports telecasts. Second, on behalf of commercial radio broadcasters, NAB challenges the Tribunal's failure to make any Phase I

award for the distant carriage of radio signals by cable. We consider these arguments *seriatim.*

1. *NAB's Claims Regarding Sports Telecasts*

In the 1979 proceeding, NAB took the position that some of the funds distributed to the sports claimants should be allocated to television broadcasters for their copyrightable contributions to the quality of sports telecasts. To this end, NAB introduced evidence attempting to demonstrate the manner in which broadcasters' efforts —such as instant replay, split screens, play-by-play commentary, and video/audio editing—add to the enjoyability of a sports telecast. *See, e.g.*, Tr. 3216-31, JA 1466-81 (videotapes of the 1981 Rose Bowl football game and of a 1981 Dodgers-Cubs baseball game). Although the Tribunal allowed this evidence into the record, it subsequently granted a request by the Joint Sports Claimants for a declaratory ruling that the 1976 Copyright Act forbade the Tribunal from awarding any "sports" royalty fees to television broadcasters. Specifically, the Tribunal reiterated its view, expressed in its 1978 Distribution Determination, that

> there is a clear course of action by the Congress [in the 1976 Copyright Act] . . . which compels the award of cable royalties for sports programming to the sports league, in the absence of contractual arrangements specifically providing that such royalties shall be distributed to broadcaster claimants.

45 Fed. Reg. 63,035 (1980) (1978 Determination); *see* 47 Fed. Reg. 9,893 (1982) (adopting rationale from 1978 Determination in Tribunal's 1979 Decision); CRT Order, Sept. 30, 1981 (granting JSC request for declaratory ruling).

This court's subsequent decision in *NAB v. CRT* squarely rejected the Tribunal's interpretation of the Act:

> Although there is some confusion in the legislative history, Congress clearly seemed to contemplate Tribunal recognition of the copyrightable interests [of broadcasters in sports telecasts]:
>
> "When a football game is being covered by four television cameras, with a director guiding the activities of the four cameramen and choosing which of their electronic messages are sent out to the public and in what order there is little doubt that what the cameramen and the director are doing is what constitutes "authorship."

675 F.2d at 378 (quoting House Report at 52). Given that the Tribunal's evaluation of NAB's claim thus rests on an incorrect legal premise, NAB urges us to remand its claim regarding sports broadcasting to the Tribunal. We agree that a remand is in order; as we stated in *NAB v. CRT*, "the Tribunal has no authority under the Act to ignore valid copyright claims." *Id.* at 379. Although it is true that the *NAB v. CRT* court found a remand unnecessary, that decision rested on NAB's failure to introduce evidence in the 1978 proceeding from which the Tribunal could conclude that NAB's interests were of more than a "quantitatively *de minimis*" value. *Id.* As NAB itself admits, "In the 1978 proceeding . . . the record contained no evidence regarding the value of the relative copyright contributions of broadcasters and sports teams to telecasts of sports events." NAB Brief at 19. In contrast, however, NAB *did* introduce evidence in the 1979 proceeding which attempted to demonstrate the value of NAB's contributions to sports telecasts. While we recognize that this evidence addresses "quality," one of the Tribunal's secondary criteria, we note that the Tribunal has found compensable value in other programs (notably those of PBS and NPR) largely on the strength of this factor. However probative of marketplace value NAB's evidence may prove to be, it is not our role to second guess the Tribunal's distributions; the assessment of NAB's evidence belongs, in the first instance, to the

Tribunal. We express no view on the distribution (if any) due broadcasters for their contributions to sports telecasts.

In remanding the case to the Tribunal, we also express no view on NAB's assertion that broadcasters are entitled to a specified percentage—either 36.5% or 18.25%—of the royalty fees allocated for sports programming. The bases for NAB's claim are two-fold: (1) that in 36.5% of the 1979 sports telecasts, U.S. television broadcasters created the programs and did not assign the copyrights in those programs to the sports teams; and (2) that television broadcasters are either the sole "authors" of these broadcasts (entitling them to 36.5% of the Tribunal's allocation for sports) or are one of the "joint authors" (entitling them to one-half of the royalty fees allocated to these telecasts, or 18.25%). Whatever the merits of this claim, NAB was not permitted to raise it before the Tribunal. Accordingly, the claim is not properly raised, in the first instance, on appeal. *See D.C. Transit System, Inc. v. Washington Area Transit Commission*, 466 F.2d 394, 413-14 (D.C. Cir.) (judicial review of administrative action limited to matters upon which the agency has had the opportunity to pass), *cert. denied*, 409 U.S. 1086 (1972). Because the Tribunal had previously (and erroneously) precluded NAB from raising "ownership" claims in the 1979 proceeding, *see* CRT Order, Sept. 30, 1981, however, we expect that NAB will be allowed to raise its authorship/joint claim to the Tribunal on remand.

2. *NAB's Claim Regarding Commercial Radio Broadcasters*

Although cable systems generally are associated with the importation of distant *television* signals, many cable systems are equipped to import distant *radio* signals as well; the 1976 Copyright Act clearly authorizes the Tribunal to use the Fund to compensate "nonnetwork

programming consisting exclusively of [distant] aural signals." 17 U.S.C. § 111(d)(4)(C) (Supp. V 1981). In its 1979 Decision, however, the Tribunal concluded that it had been "unable to discern any significant marketplace value or benefit from distant commercial radio carriage," 47 Fed. Reg. 9,894 (1982), and hence made no award to commercial radio broadcasters. On appeal, NAB contends that this non-award (1) is unsupported by substantial evidence, and (2) cannot be reconciled with the Tribunal's 0.25% Phase I award to NPR and with the Tribunal's Phase I award to the Music Claimants for the performance of copyrighted music on distant radio signals. While we find much of NAB's claim overstated, the apparent inconsistency of the Tribunal's treatment of Music and NAB forces us to remand the case to the Tribunal either for re-distribution or for an improved explanation of its non-award to NAB.

At the outset, we reject NAB's contention that its non-award is unsupported by substantial evidence. Although NAB introduced evidence which attempted to demonstrate the benefit of radio carriage to cable, *see, e.g.*, JA 1349 (cable systems typically charge separately for radio service), there is substantial evidence in the record to support the Tribunal's conclusion that commercial radio's value in the cable marketplace is sufficiently *de minimis* as not to warrant an award, *see, e.g.*, Testimony of Mr. Hall, Storer Cable Executive, Tr. 2567-71 (Storer Cable does not even attempt to ascertain the number of FM radio connections); Testimony of Mr. Abrams, Radio Programming Expert, Tr. 2708, JA 1389 (cable carriage of radio signals as of this point is not a significant factor in the radio broadcasting industry). The mere fact that the Tribunal relied on testimony (notably that of Mr. Frank Mankiewicz, then-President of NPR) which surmised that there might be "some" appeal to distant commercial radio signals, 47 Fed. Reg. 9,894 (1982), does not suffice to establish for NAB af-

firmative evidence, under the Tribunal's allocational criteria, mandating an award.

We also reject NAB's contention that the Tribunal's non-award to commercial radio is necessarily inconsistent with the 0.25% Phase I award to NPR. As the Tribunal explained, NPR

> is a producer and syndicator of innovative, distinctive and quality radio programming that is transmitted by a number of cable systems as a distant signal. As with our review of the PBS claim, some customary guides to judging the marketplace value of program product are not useful. The record supports a finding that the programming has a special appeal, which justifies an award.

47 Fed. Reg. 9,894 (1982). There is substantial evidence for the Tribunal's conclusion that NPR's programming is of a distinctive quality, *see, e.g.*, Summary of NPR's Evidentiary Position, 47 Fed. Reg. 9,887 (1982) (NPR receives 100 times more awards than commercial radio), and for its conclusion that the quality of NPR's programming has special appeal to cable subscribers, *see, e.g.*, Affidavit of Janice Hill, NPR Deputy General Counsel, JA 64-66 (summarizing NPR's exhibits of letters of support to NPR for distant cable listeners). Given these documented differences in quality between commercial and public radio, we find the Tribunal's exceedingly small 0.25% award to NPR to be within a zone of reasonableness bounded, on the one hand, by the record evidence of NPR's quality and, on the other, by the record evidence of radio's generically *de minimis* value in the cable marketplace. The miniscule award to NPR is not necessarily inconsistent with the *de minimis* value of radio generally.

We have difficulty, however, in reconciling the Tribunal's award to the Music Claimants with its non-award to commercial radio broadcasters. Although the Tribunal did not specify how much of Music's 4.25% Phase I

award was meant to reflect the use of copyrighted music on retransmitted radio, as opposed to television, signals, the Tribunal made clear that some of Music's award was intended to compensate copyright holders for the use of their music on radio:

> We find in the record in the cases of several parties sufficient evidence for use to include in our award to music some compensation for the significant performance of copyrighted music on distant radio signals. The useful evidence on this issue is based on time, and even within that standard the record is not clear. . . . However, the total of copyrighted music is such as to warrant an award to music.

47 Fed. Reg. 9,894 (1982). While, viewed in isolation, we find no fault with the Tribunal's reliance on Music's "time" evidence, we find the Tribunal's award to Music fairly inexplicable in light of the Tribunal's position, in explaining its non-award to NAB, that radio retransmission by cable (which presumably includes retransmission of radio's music) has virtually no marketable value whatsoever. The mere fact that Music introduced evidence indicating that approximately 70% of the total time of commercial FM radio stations is occupied by music, *see* Tr. 2708-10, JA 146, does not seem to warrant an award given the Tribunal's conclusion, vis-à-vis NAB, that it had been unable to discern *any* marketplace value for all (100%) of distant commercial radio carriage, 47 Fed. Reg. 9,894 (1982). Contrariwise, the Tribunal's award to Music suggests that its non-award to NAB was arbitrary.

On appeal, counsel for the Tribunal suggests that "an award for the *musical content* of radio signals is not inconsistent with the denial of an award for the *format* of a rock-and-roll or country-and-western station." Tribunal Brief at 39 (emphasis added). Whatever the merits of this distinction, it constitutes the sort of post-hoc rationalization on which the defensibility of the Tribunal's distributions cannot depend:

> [A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

SEC v. Chenery Corp., 332 U.S. 194, 196 (1947). As we read the Tribunal's Decision, it denied an award to commercial radio broadcasters because it was unable to discern any marketplace value to distant commercial radio carriage *in toto*, and not because it failed to discern any value to the "formatting" element of a radio signal. Indeed, we are not even certain that the Tribunal would subscribe to its counsel's post-hoc suggestion. The Tribunal expressly concurred in PBS's assessment of the commercial radio evidence, 47 Fed. Reg. 9,894 & n.494, and PBS gave particular weight to the testimony of Mr. Lee Abrams, a commercial radio analyst, *see* PBS Proposed Findings of Fact at 100, *reprinted in* JA 159-60. Included in Mr. Abrams' testimony, however, was his belief that the "format" element of a radio signal was *more important* than the "music" element:

> Radio stations play records. The same records are available to all radio stations. Why is it, then, that some stations succeed in attracting and appealing to many listeners and others fail? The answer is *formatting*. Formatting is the pre-planning and control of all elements of a radio station's presentation so as to create a consistent and unified sound.

Tr. 2610-11, JA 1358-59 (emphasis added). Moreover, the context of the Tribunal's only specific reference to "format"—in a quotation from Mr. Frank Mankiewicz—does not readily lend itself to a distinction between Music Claimants and commercial broadcasters. Mr. Mankiewicz testified:

> [I]t is difficult to imagine the appeal in community 'A' of an additional top 40 station whose signal is b[r]ought from community 'B'. Since commercial radio stations, with very few exceptions, are using one of five, or, perhaps, at the most, six formats which are present in every commercial market, our feeling is that the appeal of an imported commercial station signal is very limited.

47 Fed. Reg. 9,894 (1982). As we indicated in *NAB v. CRT*, Mr. Mankiewicz's allusion to "the ubiquity of recorded music" may provide an adequate basis on which to deny an award to commercial radio claimants in general. *See* 675 F.2d at 379-80 (reviewing 1978 Determination in which Tribunal made no award to either the "music" or "format" elements of retransmitted radio signals). But Mr. Mankiewicz's testimony provides a questionable basis on which to foreclose broadcasters from an award because of the ubiquity of their formatting while simultaneously granting an award to the Music Claimants because their ubiquitous music was played 70% of the time. *See also* NPR Intervenor Brief at 9; NAB Reply Brief at 13-14 (indicating that 15% of commercial radio stations, constituting more than four times the number of NPR stations, provide relatively uncommon program formats).

Although it may well be that the Tribunal can adequately explain its different treatment of the Music and commercial broadcasting radio claimants, the inadequate state of its present explanation requires us to set aside its "radio" award to Music and non-award to NAB as arbitrary. Accordingly, we remand these aspects of the Tribunal's Decision to the agency.*

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* In its intervenor's brief, the Canadian Broadcasting Corporation (CBC) also challenges the Tribunal's Decision; in particular, CBC objects to what it perceives to be a non-award for CBC FM "public" radio. Although CBC's claim is not properly before us in a petition for review, we note that

CONCLUSION

As we indicated in *NAB v. CRT*, the Tribunal faces a difficult task in conducting the distribution of cable royalties "because of the number of claimants and the inescapably qualitative problem of evaluating their competing claims." 675 F.2d at 385. Our appreciation of the complexities involved in cable royalty distribution has not diminished; indeed, the Tribunal's task may become even more difficult as claimants attempt to interpret the nuances of the Tribunal's past decisions and to improve accordingly the sophistication of their evidentiary presentations. Although, in many respects, we find challenges to the Tribunal's 1979 Decision to reflect little more than the boundless litigiousness of disappointed claimants, the increasing complexity of the Tribunal's allocations only underscores, in other respects, the need for improved clarity in the Tribunal's decisionmaking. As this court has stated before:

> We wish to emphasize . . . that precisely because of the technical and discretionary nature of the Tribunal's work, we must especially insist that it weigh all the relevant considerations and that it set out its conclusions in a form that permits us to determine whether it has exercised its responsibilities lawfully. Courts may not make the judgments entrusted to politically-accountable institutions. They can and must, however, ensure that those judgments provide a basis for popular review by requiring that the choices they reflect are informed by the views of all interested parties and are fully disclosed.

CBC's objections appear misplaced—the Tribunal's 0.75% Phase II award for Canadian broadcasting was meant to exclude only commercial, but not CBC FM, radio. *See* Tribunal Brief at 41 ("The Tribunal did not make separate awards for television and radio. The Tribunal did not treat CBC FM radio as a commercial operation. . . .").

National Cable Television Association v. Copyright Royalty Tribunal, 689 F.2d 1077, 1091 (D.C. Cir. 1982) (Bazelon, J.).

We do not mean to charge the Tribunal with needless formalism: given its burden of simulating the subtleties of the cable marketplace within a one-year decisionmaking period, the Tribunal need not lace its distribution determinations with unnecessary rhetoric. But Congress *has* directed the Tribunal to state in detail the criteria, factual findings, and "specific reasons for its determinations." 17 U.S.C. § 803(b) (Supp. V 1981). The Tribunal may not abdicate this responsibility. Nor may it attempt to distinguish apparently inconsistent awards with simple, undifferentiated allusions to a 10,000-page record. As the Tribunal continues to accumulate experience with royalty fee distributions, we continue to hope that the clarity of its decisionmaking will improve.

For the reasons discussed above, the Tribunal's 1979 Decision is remanded for the reconsideration described in Parts III B and III D of this opinion and is, in all other respects, affirmed.

So ordered.

APPENDIX D

49 Fed. Reg. 37653 (1984)

COPYRIGHT ROYALTY TRIBUNAL

[Docket No. CRT 83-1]

1982 Cable Royalty Distribution Determination

AGENCY: Copyright Royalty Tribunal (Tribunal) announces the adoption of its final determination in the proceeding concerning the distribution to certain copyright owners of royalty fees paid by cable systems for secondary transmissions during 1982.

FOR FURTHER INFORMATION CONTACT: Thomas C. Brennan, Chairman, Copyright Royalty Tribunal, (202) 653 5175.

SUPPLEMENTARY INFORMATION:

INTRODUCTION

17 U.S.C. 111(d)(5)(B) requires the Tribunal after the first day of August to determine whether a controversy exists concerning the distribution of cable royalty fees deposited by cable systems with the Copyright Office. Upon determination that a controversy exists, 17 U.S.C. 804(d) requires the Chairman of the Tribunal to publish in the Federal Register a notice announcing the commencement of distribution proceedings.

In a notice published in the Federal Register of August 8, 1983 (48 FR 35989), the Tribunal directed that claimants to royalty fees paid by cable operators for secondary transmissions during 1982 submit not later than September 20, 1983 any comments concerning whether a controversy exists concerning the distribution of the 1982 royalty fees.

The Tribunal on October 12, 1983 published in the Federal Register (48 FR 46412) its determination that a controversy did exist concerning the distribution of cable

royalty fees for the period January 1 through December 31, 1982.

BACKGROUND AND CHRONOLOGY

On May 6, 1983, the Motion Picture Association of America, the Joint Sports Claimants, the Public Broadcasting Service, the Music Claimants and National Public Radio (the "Settling Parties") filed with the Tribunal an agreement in which they agreed to seek in the 1982 distribution proceeding a single aggregate award which would be divided among them "in the proportions determined by their individual Phase I awards in the 1979 and 1980 distribution proceedings (with the proviso that NPR's share shall not be reduced below 0.25 percent of the total funds)." Subsequently the National Association of Broadcasters and the Canadian Claimants agreed to resolve the Phase I proceeding on the basis of the Tribunal's 1979 and 1980 awards. These agreements contemplated that any award to the Devotional Claimants in this proceeding should be accomplished by a pro rata reduction of shares of other parties.

As in prior distribution cases, the Tribunal conducted the proceeding in two phases. In Phase I the Tribunal receives evidence concerning the awards to general categories of claimants, while in Phase II it receives evidence concerning disputes within categories. The Tribunal held evidentiary hearings on Phase I and Phase II issues, including rebuttal cases, on July 17, 18, 24, 25, 26 and August 2, 3, 6, 7.

The Tribunal directed parties to submit proposed findings of fact and conclusions of law on August 22, 1984. Reply findings were received on August 31, 1984.

The Tribunal incorporated the Phase I and Phase II records of the 1978, 1979, 1980, and 1981 cable distribution proceedings into the record of the 1982 proceeding.

On September 6, 1984, the Tribunal granted the motion of the Turner Broadcasting System, Inc. to intervene in the Phase II proceeding.

PHASE I

Structure of Phase I Cases

We begin with the argument advanced by the Devotional Claimants[1] that the record of the 1982 proceeding "is devoid of any evidence upon which to base an award to any claimant group other than PBS and the Devotional Claimants." The Devotional Claimants assert that other parties "have only put in rebuttal and surrebuttal evidence against the Devotional Claimants." Devotional Claimants conclude therefore that no award can legally be made to these parties.

We find no merit in the argument of the Devotional Claimants, which in our view reflects a myopic view of the matters to be determined by the Tribunal in this Phase I proceeding. All Phase I parties, other than Devotional, in a series of voluntary agreements determined the Phase I awards. Since these argeements did not include the Devotional Claimants, the only controversy to be determined by the Tribunal was what award, if any, to make to the Devotional Claimants.

We also reject the argument that the 1982 Phase I record provides no basis for an award to most other categories of claimants. The Tribunal incorporated into the 1982 record 20,194 transcript pages of prior distribution proceedings. Devotional Claimants made no showing that the collective situation of the other Phase I parties changed in 1982.

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[1] Devotional Claimants' Proposed Findings of Fact and Conclusions of Law, pp 37-39

"Special Factors" and "Fundamental Distinction"

In our 1979 determination[2] the Tribunal gave weight to certain "special factors" deemed relevant to the devotional claims, namely the purchase of broadcast time by devotionals and perceived benefits to such claimants from cable retransmission. We viewed these factors as establishing a "fundamental distinction" of the devotional claims from other claims. In reviewing our 1979 determination, the Court of Appeals for the District of Columbia Circuit wrote: "We begin by reiterating that there is nothing necessarily irrational about the Tribunal's 'fundamental distinction'."[3] In our 1979 and 1980 remand determinations[4] we gave less weight to these "special factors," in part because of the state of the record. We indicated that in subsequent proceedings we expected the parties to develop a fuller record on these matters. This would then permit the Tribunal to discuss these matters in greater detail than was previously possible because of the record and the time restraints of 17 U.S.C. 804(e).

Other than for the evidence and testimony of PBS presented for the purpose of seeking to rebut Devotional Claimants' argument that they were comparable claimants, we find a failure of the Settling Parties and NAB to make any showing that would be useful to the Tribunal on the "special factors" issues, which we had designated for particular review in this proceeding.

The Settling Parties argue in their reply findings[5] that

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[2] 47 FR 9896-97.

[3] The Christian Broadcasting Network, Inc. v The Copyright Royalty Tribunal, 720 F.2d 1295-1309 (1983).

[4] 47 FR 9879-9900 and 48 Fr [*sic*] 9552-9570.

[5] Settling Parties' Reply Findings of Fact and Conclusions of Law p. 13.

the "record as a whole demonstrates that devotional programming does not satisfy the Tribunal's distribution criteria." This is the issue for the Tribunal to resolve. The Settling Parties provide assertions, but have not supplied supporting evidence. We have given in this determination no weight to the "special factors," and we reject the conclusion of the Settling Parties that they have established that the devotional claimants do not qualify for an award under the Tribunal's distribution criteria.

Evidentiary Record

The Tribunal in the 1978 cable royalty distribution proceeding adopted the criteria to be applied in that and subsequent cable royalty distribution proceedings. The criteria, an analysis of the criteria, and the relative weight accorded each factor are set forth in the 1978 distribution opinion.[6] We have applied the distribution criteria to the record evidence in this proceeding, including the incorporated records of previous proceedings. In practice we have found that our distribution allocations are rooted in a search for the marketplace value of the transmitted programs, and the benefit of particular types of distant signal programming to cable operators.

We wish to emphasize that we are deciding the 1982 case on the basis of the total record in this proceeding, and that we do not propose to review here conclusions reached in other proceedings on the basis of the evidentiary record before us in those proceedings. We also affirm that cumulative experience based on cumulative evidence cannot be excluded from the decision process.[7]

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[6] 45 FR 63035-37

[7] See also 49 FR 20049, in which we stated with regard to our 1979 determination that it was reasonable to alter awards "given a greater refinement in our ability to assess a claimant's overall case and weight [*sic*] even unchanged evidence more accurately."

With reference to the new evidence of the 1982 record, we believe that the Devotional Claimants have made an effort to respond to our findings of deficiencies in their previous presentations. We have been particularly troubled in prior proceedings by their showings as to the marketplace value of their programs, and the benefit of their programs to cable operators.

In deciding to make a larger award to the devotional claimants than previously, we have given weight to the Devotional Claimants Exhibit 3, a survey of the attitudes of cable system managers toward programming. The Tribunal reads this survey as supporting a finding of some cable operator interest in devotional programming. While finding the survey helpful to our determination, we also acknowledge the assertions of the Settling Parties that there are deficiencies in this survey.[8] These limitations, such as the size and timing of the survey, precludes the Tribunal from utilizing the survey, even with other evidence, to produce the award requested by the Devotional Claimants.

Devotional Claimants have introduced the report entitled, "Religion and Television," a Research Report by the Annenberg School of Communications of the University of Pennsylvania and the Gallup Organization. While the report contains much interesting data, we have found it to have only limited relevance to our task in this proceeding. It is not related to the retransmission of distant signals, which while not destroying all relevance, requires the Tribunal to make adjustments to glean what is of value to our determination. We read this report as establishing that there is a core constituency for religious programming, but that such programming has little appeal beyond the

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[8] Settling Parties Proposed Findings of Fact and Conclusions of Law, pp 20-21.

core constituency. As with other reports and surveys presented over the years to the Tribunal, it in no way by itself provides support for any particular level of award to the devotional claimants.

We have also considered the Cable Television Viewer Survey (Devotional Claimants Exhibit 2) which indicates that obtaining access to devotional programming is a factor in the determination of some people to subscribe to cable television.

The Settling Parties have sought to rebut the Devotional Claimants case by presenting the A. C. Nielsen Company's Report on Syndicated Programs (ROSP) data on local market viewing of selected Devotional Claimants' programming, which shows low ratings for this programming and the 1982 Special Nielsen Study which relates to the time and viewing of programs as distant signals in cable households. But, again, we must balance these data with our conclusions in earlier proceedings, as to the measure of value to cable operators of viewing figures.

Other Distribution Criteria

We again found in this proceeding that the "harm" test is of limited utility in allocating royalty fees among categories of claimants.[9]

We affirm our previous conclusions that the total number of hours of categories of programming on distant signals provides limited guidance to a reasonable allocation of cable royalties.

The "new" 1982 evidence did not require analysis under the quality criterion.

Public Broadcasting Factor

The Public Broadcasting Service and Devotional Claimants in their proposed findings have discussed a number

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[9] See 47 FR 9892.

of issues relating to the status and relationship of these two categories of claimants. Our determination in this proceeding has not required us to make findings on all the issues presented. We adhere to our view that the situation of the public broadcasting claimants, and the devotional claimants is not similar, and that these differences support a substantially larger award to the public broadcasting claimants. When a cable operator determines to import a distant public broadcasting signal all the programs on that signal are public television programs. We find in these programs a diversity of content, and appeal to a broad range of the public, that we have not been able to discover on the basis of the evidence before us in the programs of the devotional claimants. We continue to believe that public television programs occupy a unique position in the cable television marketplace by presenting diverse programming that is not available on commercial signals.

Phase I Allocations

On the basis of the above, and the entire incorporated record, we make an award of 1% to the Devotional Claimants. Subject to the disposition of the Devotional Claimants, all other Phase I parties have resolved by voluntary agreements that the Phase I awards to claimants shall be in the percentages determined by the Tribunal in the 1979 and 1980 cable royalty proceedings. It was also provided that any award by the Tribunal to the Devotional Claimants in this proceeding should be accomplished by a pro rata reduction of the shares of other parties. The Settling Parties further agreed that the share of National Public Radio should not be reduced below 0.25 percent of the total funds. The Tribunal finds that the exclusion of National Public Radio from the pro rata reduction is reasonable.

It is therefore ordered the Devotional Claimants be awarded 1%, and that, other than for the National Public Radio, the 1979 and 1980 awards to other Phase I parties

be reduced on a pro rata basis to provide for the award to the Devotional Claimants. It is further ordered that in accordance with the voluntary agreement of the Settling Parties a single aggregate award be made to them to be divided among them "in the proportions determined by their individual Phase I awards in the 1979 and 1980 distribution proceedings." It is further ordered that the 1982 cable royalties be distributed in accordance with the above.

PHASE II

The only claimant categories requiring Phase II proceedings are Program Syndicators, and Sports.

Program Syndicators—Multimedia Claim

The only Program Syndicator evidentiary hearing resulted from the failure to reach a voluntary agreement as to the claim of Multimedia Entertainment, Inc. (Multimedia).

Our review of the record as it relates to 1982 permits only one conclusion—a significant reduction is required from the level of our previous awards to Multimedia. We address first the argument of Multimedia that because of the Tribunal's disposition of the Multimedia claim in some previous proceedings, the Tribunal should refrain from making the downward adjustment which to us is otherwise compelled by the 1982 record. The record establishes that the Tribunal was divided on whether an upward adjustment was required in the 1980 proceeding by the addition of Show Biz programs to the Multimedia claim and the significant growth in the carriage of WGN-TV, particularly in relation to the award standard applied by the Tribunal to the record evidence of parties in that proceeding. Whatever validity there may have been to Multimedia's arguments to the Tribunal, if Multimedia was aggrieved by the Tribunal's determination, the Copyright Act provides a remedy for such grievances. We reject any contention that

we should refrain from a downward adjustment of the 1982 Multimedia award because of our prior determinations.

We find that the removal of the "Donahue" program from WGN significantly reduces the value of the Multimedia claim, and that this loss is not offset by the evidence as to other 1982 programs in the Multimedia claim.

According to MPAA Exhibit 3, "Donahue" achieved only 4.3 million household viewing hours in 1982 versus 10.6 million in 1981. The substantially reduced availability decreases its marketplace value and benefit to cable operators. Our conclusion is fortified by reviewing earlier proceedings in which Multimedia stressed the distant carriage of the live Donahue show on WGN, and the particular value and appeal of the live show.

At best, we find that shifts in other programs in the Multimedia claim does not offset the "loss" to the claim resulting from the change in the "Donahue" carriage. Country music specials have increased in numbers, but such specials had reduced ratings in 1982 compared to 1981. Fewer programs were syndicated in 1982 and several programs, such as "Tony Brown's Journal, [*sic*] were dropped from syndication. The amount of programming fell by 10%.

We reaffirm our earlier findings as to the special appeal and marketplace value of programs in the Multimedia claim. This evidence continues to support an award in accordance with our distribution criteria.

Challenge to MPAA Claim

Multimedia has conducted a review of the copyright status of certain older movies broadcast in 1982 over WTBS. It is stated that "Copyright Office research determined that several of the movies shown on WTBS do not

have valid copyright registrations."[10] Multimedia further argues that "no royalties should be awarded MPAA for any program whose copyright authenticity is not firmly established. [*sic*] It is argued that because of the importance of WTBS signal carriage, it cannot be argued that the impact is de minimus. We do not agree. The Tribunal will consider and reflect in our awards significant copyright matters. But we do not intend to burden claimants with a totally unnecessary exercise in paper collection because there may be some public domain films included in the Nielsen Study. We find the Multimedia argument utterly lacking in merit.

Multimedia also argues that MPAA has failed to provide a list of the programs accounting for one-third of the viewing hours in the Nielsen Study, and therefore "one-third of MPAA's share must be withheld." No serious argument has been made as to why this information is essential to our determination in this proceeding. We find no merit in this argument.

MPAA Case

The primary basis for the MPAA and Associated Program Suppliers Phase II claim was the 1982 Neilsen Study. As in past Phase II proceedings, the Tribunal has accorded substantial weight to these viewing data, but has not utilized the study as the sole basis for our allocations.

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[10] Multimedia on September 7, 1984 filed a motion to Strike certain data in the Program Suppliers' Reply Findings, namely a letter of December 27, 1983 from Turner Broadcasting Inc., and certain viewing data respecting public domain movies. It is argued that these matters are "evidence outside the record." Program Suppliers on September 14, 1984 filed an Opposition to Motion to Strike. The motion is granted.

Syndicator Award

On the basis of the above, 1% of the Program Syndicators share is awarded to Multimedia. In accordance with voluntary agreements, 0.8 is awarded to the National Association of Broadcasters, and 0.7 is awarded to the Spanish International Network. 97.5 of the Program Syndicators share is awarded to the MPAA and Associated Program Syndicators.

Sports—Spanish International Network (SIN) Claim

This case marks the first Phase II proceeding in the Sports category. SIN is seeking a portion of the sports award based on its distribution of the 1982 World Cup—an international competition among professional soccer teams that occurs once every four years.

Jurisdictional Questions

1. The Joint Sports Claimants (JSC) argue that SIN must be denied a share of the sports royalties "because SIN did not assert a Phase II claim for royalties and the JSC Phase I award is only for their own programming." In an order of July 23, 1984 the Tribunal denied the JSC motion to dismiss SIN's sports claim.

The SIN claim for 1982 cable royalties, in responding to the Tribunal's requirement that claimants identify the nature of the works for which compensation is requested, stated: "Television programs in the Spanish language which it licenses for transmission on television stations in the U.S."

We are unable to accept the argument that a Tribunal Phase I award for sports covers only the programs of the JSC. This view is not in accordance with the Tribunal's treatment of Phase I categories as applying to generic categories of programs. The Tribunal in certain prior proceedings has given considerable attention to the competing

claims of two categories of claimants to sports royalties. Nothing in our previous pronouncements on the allocation of sports royalties provides support for the arguments now advanced by JSC.

2. We also are unable to accept any argument that the voluntary Phase II agreement reached between SIN and other claimants to the royalties awarded under the Program Syndicator category bars SIN's claim to a share of the sports royalties, or provides compensation under the statutory compulsory licensing scheme for their sports programming in the 1982 proceeding. We again decline to intrude into any aspect of voluntary agreements.

3. SIN has argued that the JSC claimants have overstated the amount of their compensable programming by over 40 percent because they have "improperly" included in their claim Atlanta Braves baseball games broadcast by WTBS. On the basis of a decision by the United States District Court for the Southern District of New York in *ABC Sports, Inc. et al. v. Atlanta National League Baseball Club* SIN argues that the WTBS signal is not an over-the-air broadcast signal under Section 111 of the Copyright Act, that the Copyright Act did not intend for the compulsory license scheme to compensate copyright owners who had authorized distant signal carriage, that distant signal carriage of the Braves' games would not be an infringement of either the Braves or WTBS's copyright, and that the WTBS signal is not a distant signal subject to compulsory license.[11]

We need not in this proceeding address any of these issues presented by SIN. It is sufficient to state that, even under the flexible procedures of the Tribunal, it is not appropriate to litigate such matters before the Tribunal

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[11] SIN Proposed Findings of Fact and Conclusions of Law, pp 37-49.

at the time chosen by SIN, particularly when the record is bare of any testimony that would illuminate the issues.

Evidentiary Record

We have had the opportunity in previous proceedings to consider the benefit of SIN's programming in general to cable operators. In our 1979 determination we concluded that "SIN's Spanish language programming is of particular marketplace value and benefit to cable operators in attracting Spanish-speaking subscribers."[12] But the only issue in this proceeding is the distant signal value and benefit of the World Cup.

From the record of this proceeding we are satisfied that the 1982 World Cup was an important event in sports, that it was popular with a limited audience and that the distant signal carriage of that event had some marketplace value. However, SIN acknowledged that only a relatively small incremental percentage of the Hispanic population would be reached by distant signal carriage.[13] Furthermore, as a distant signal the World Cup telecasts reached less than 4 per cent of the cable industry.[14]

In our Phase I allocations we have attached particular importance to the benefit to cable operators of distant signal sporting events. But we are unable in this record to conclude that SIN's World Cup telecasts conferred any meaningful benefit on cable systems. Although SIN made the telecasts available free of charge only 12 cable systems not otherwise carrying the programming accepted SIN's offer.

Joint Sports Claimants sought to rebut evidence introduced by SIN that carriage of the World Cup benefited

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[12] 47 FR 9896 and 48 FR 9569.

[13] Tr. 421.

[14] Joint Sports Claimants Exhibit 5A; Tr. 1184-87.

cable operators with a survey of cable operators who carried the telecasts. We agree with SIN that the methodology of the survey was flawed, by failing to compare the value of distant signal carriage of World Cup as compared to the value of distant signal carriage of the events of Joint Sports. But, other evidence in the total record establishes the benefit of JSC programming.

SIN sought in several ways to establish the marketplace value of the World Cup. It compared what SIN paid for rights to the World Cup with the price paid for the rights to broadcast Major League Baseball events. We agree with JSC that this analysis, even if factually accurate, is largely irrelevant as it does not relate to the value of the telecasts on a distant signal basis.

SIN has also proposed as a measure of the relative marketplace value of the World Cup a formula comparing the total number of subscriber events attributable to World Cup to the total number of subscriber events attributable to Joint Sports. Subscriber events are defined as the number of cable subscribers on distant signal cable systems times the number of relevant sports events carried by those systems.

It will come as no surprise to diligent readers of our opinions that the Tribunal has not found SIN's subscriber events formula to be a useful tool in the allocation of cable royalties. In addition to our often stated reservations about the utility of formulas, we are unable to see any relationship between the formula proposed and our distribution criteria, and past determinations.

Both SIN and JSC correctly note that the Tribunal has used viewing data as a "starting point" from which the distribution criteria are applied. By any measure, SIN's World Cup telecasts generated, on a distant signal basis,

only an infinitesimal share of viewing.[15] We find in this record no basis for any significant adjustment from the viewing figure base.

We have already stated that we have not found the harm test to be of much utility in the division of cable royalties. Our record concerning SIN's business judgment to offer the World Cup as a "present" to the cable industry further dilutes the value of the harm criteria, and provides no support for an allocation of royalties to SIN.

On the basis of the above, we award 0.02 of the Sports share to SIN, and the balance of Sports share to JSC. This award as it relates to viewing is consistent with the viewing/award ratio reflected in our previous awards to SIN, and in the 1982 Phase II program syndicator voluntary agreement.[16]

Commissioner Hall did not participate in this determination.

Thomas C. Brennan,
Chairman.

September 20, 1984.

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[15] Joint Sports Proposed Findings of Fact and Conclusions of Law, pp 17 and 18.

[16] JSC Reply Findings, p 17, footnote 15.

APPENDIX E

49 Fed. Reg. 28090 (1984)

COPYRIGHT ROYALTY TRIBUNAL

[Docket No. CRT 81-1]

1980 Cable Royalty Distribution Determination

AGENCY: Copyright Royalty Tribunal.

ACTION: Notice of Final Determination.

SUMMARY: The Copyright Royalty Tribunal (Tribunal) announces the adoption of its final determination in the remand proceeding concerning the distribution of the cable television royalty fees paid by cable systems for secondary transmissions during 1980.

FOR FURTHER INFORMATION CONTACT: Thomas C. Brennan, Chairman, Copyright Royalty Tribunal, 1111 20th Street, NW, Washington, DC 20036. Phone (202) 653-5175.

INTRODUCTION

The Tribunal on March 7, 1983 published in the Federal Register (48 FR 9552) its final determination in the proceeding for the distribution of the 1980 cable royalties. Appeals of this determination were taken by several parties in the United States Court of Appeals for the District of Columbia Circuit.

17 U.S.C. 804(e) requires the Tribunal to complete all proceedings within one year from the commencement. There is no similar limitation on the time consumed by judicial review of the Tribunal's determinations, consequently the Trubunal [*sic*] was required by 17 U.S.C. 804 (e) to adopt its final determination in the 1980 distribution

proceeding prior to the decision of the United States Court of Appeals for the District of Columbia Circuit in the several appeals of the Tribunal's 1979 cable distribution determination. The United States Court of Appeals for the District of Columbia Circuit in Christian Broadcasting Network v. Copyright Royalty Tribunal, 720 F 2d 1295 (D.C. Circuit 1983) affirmed the Tribunal's decision in nearly all respects, but remanded three issues for further Tribunal proceedings. These issues related to the allocation of the royalties for sports programming, the Tribunal's zero awards to the Devotional Claimants, and the Tribunal's treatment of the commercial radio claims and the radio portion of the award to Music. Following the Court's decision in the 1979 case, the Tribunal filed a motion with the Court requesting the remand of the 1980 determination so that the Tribunal might further consider its determination in accordance with the Court's opinion. Other motions were also filed. The Court in an order of February 9, 1984 vacated the Tribunal's decision and remanded the case to the Tribunal for proceedings consistent with the Court's opinion.

The Tribunal in an order published in the **Federal Register** of May 3, 1984 (49 FR 18883) directed parties to submit their procedural proposals concerning the implementation of the Court's order. In an order of May 29, 1984 the Tribunal established the procedures for the 1980 remand proceeding, and in an order of June 6, 1984 denied a request of the Settling Parties[1] to notify [*sic*] this order.

No additional evidence was received during the 1980 remand proceeding. The only additional proceedings provided

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[1] The Settling Parties are Motion Picture Association of America, Inc. (MPAA), American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI), Joint Sports Claimants (JS), Public Broadcasting Service (PBS), SESAC, Inc., and National Public Radio (NPR).

for supplemental proposed findings of fact and conclusions of law on the issue of the Devotional claims. Replies to these findings were also received.

The Tribunal adopts as its determination in this proceeding the tribunal's [*sic*] opinion as published in the **Federal Register** of March 7, 1983 (48 FR 9552-70) with the exception of the sections on the Phase I disposition of the claims relating to Joint Sports, Devotional Claimants, Commercial Radio, the radio portion of Music, and the awards order. These subjects are resolved exclusively as set forth below.

Joint Sports

The Tribunal's award to Joint Sports is subject to, and in accordance with, the Tribunal's order of January 31, 1984 (49 FR 3899).

Devotional Claimants

The Tribunal in the 1980 original and remand proceedings has given particular attention to the evidence seeking to establish changed circumstances from the 1979 record. The principal witness for the Devotional Claimants testified that "the underlining principles are still basically the same and there isn't really that much change."[2]

Most claimants in the original 1980 proceeding sought to improve their presentation in areas where the Tribunal has found gaps or deficiencies. No such undertaking was made by the Devotional Claimants. There was no assertion of changed circumstances, or evidentiary showings to address our inability to find more than a negligible marketplace value based on their 1979 evidence. The factual presentation was essentially limited to a showing of the amount

[2] Transcript p. 3266.

of time religious programs were broadcast by stations included in the Nelsen survey. Because of the motivations of broadcasters concerning the presentation of religious programming, time-based statistics are even less indicative of value for devotional programming than for other programming categories.

The Tribunal finds no basis in the 1980 record to view the case of the Devotional Claimants more favorably than our assessment of their case in the 1979 remand proceeding. The Settling Parties argue that "the 1980 evidence shows the Devotional Claimants to be in worse position than they were in 1979."[3] They argue that the new time statistics "show a decline in devotional programming's share of time."[4] Applying the same standard as in the original 1980 proceeding, the Tribunal finds that none of the evidence presented on the Devotional issues is of such decisional significance as to alter the award we made in the 1979 remand. The Tribunal has therefore made an award of .35 of the entire royalty fund to the Devotional Claimants.

In the Tribunal's recent determination in the 1979 remand proceeding, we discussed our findings on the cases of the Devotional Claimants.[5] We adopt those findings in this proceeding. We limit our further discussion to certain matters raised in the 1980 record and the supplemental findings.

The Devotional Claimants attach significance to the Tribunal's decision to remove in the 1980 proceeding the devotional claims from the program syndicator category, and to create a new Phase I category for the Devotional

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[3] Settling Parties Initial Brief on the Remanded Devotional Claimants Issues, June 15, 1984, p. 12.

[4] Ibid., p. 11.

[5] 49 FR 20049-50.

Claimants.[6] They argue that the grouping of devotional programmers in 1980 was enlarged to include not only the programs of the three 1979 devotional claimants "but to include as well *all* of the other producers of devotional programming which was carried as a distant signal in 1980." We do not find that the evidence presented by the Devotional Claimants as to various kinds of devotional programming carried by cable systems in 1980 on a distant signal basis provides a basis for a larger award than in 1979, particularly when viewed with other "new" 1980 evidence.

Devotional Claimants also argue that "factual circumstances of the Devotional Claimants' case have in fact changed between 1979 and 1980." They argue that in particular the relationship between the Devotional Claimants and the public broadcasting claimants is altered to the benefit of the devotional claimants. They maintain that as the devotional category in 1980 "consists of *all* devotional program syndicators" the Tribunal cannot continue to distinguish between these claimants on the basis that one presents a single theme program concept, while the other presents a broad range of programs. Nothing presented in the 1980 record has persuaded us to modify this distinction.

The Devotional Claimants again call our attention to distant cable carriage of the CBN-owned station KXTX-TV. They ignore evidence in the record which permits the conclusion that non-devotional programming was a significant factor in cable carriage,[7] as well as the impact of the rules of the Federal Communications Commission on the carriage of specialty stations by cable systems.

The Settling Parties argue, as they did during the 1979 remand, that devotional programming does not qualify for

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[6] Reply Findings of Fact and Conclusions of Law of Devotional Claimants, p. 2.

[7] 1979 Record, Joint Sports Exhibit 10 and MPAA Exhibit H.

any award under the Tribunal criteria. They string together a long list of perceived evidentiary failures in the case of the Devotional Claimants (e.g., "no evidence supports the 'specific harms' claimed"; "no evidence has even been presented that commercial stations fix their advertising rates in this manner"; "no specific instance of increased cost due to audience fragmentation was offered"; "Devotional Claimants did not show that cable systems benefit from distant carriage of their programming"; etc.). The Tribunal has found deficiencies in the presentation of all claimants. Operating within the practical limitations of a distribution proceeding, and a far from ideal record, the Tribunal must attempt to apply our criteria in a uniform manner.

The Tribunal has found in previous proceedings that there may be special factors relating to the application of the criteria to the Devotional Claimants, which could justify a zero award to them. We indicated in our 1979 remand opinion that in subsequent proceedings, we would expect the parties to develop a fuller record on these special factors. Meanwhile, a uniform application of the criteria, and a consistent assessment of the evidence supports some award to the Devotional Claimants.

Radio Portion of Music

Upon reviewing the 1979 record and arguments on remand, the Tribunal continued to find music justified to an award for distant cable radio carriage; however, because the value of commercial radio generally in the cable marketplace is *de minimis*, this award is a very small share of the total award to music.

The Tribunal considered only two tangible pieces of evidence in the record helpful as a basis upon which to make a judgment: (1) That commercial radio is in fact carried as a distant signal, and (2) that this carriage is overwhelmingly music. In addition, we relied on the testimony

of Mr. Abrams concerning the preponderance of music on radio signals.[8] These considerations shed no light on the true worth of commercial radio programming in distant signal markets; however, they left unassailable the simple fact that the vast bulk of that programming is music; just as the vast bulk of programming on distant cable television is that of the Program Suppliers, to whom no one has denied the right to the preponderant share of those royalties, including NAB.[9]

Although we judge that such an award is justified, we are unable to quantify it and find it incalculable and extremely small. Cable operators receive some benefit in being able to offer commercial radio as a distant signal, as evidenced by the fact that it is carried, but that value is undeterminable, and to the extent that it exists is overwhelmingly attributable to music by the only measure available—time.

In employing the time criterion, as a basis for our judgment, the Tribunal rejected a proposal by the music claimants that we employ the percentage of programming costs.[10] No inferences, therefore, may be drawn, as suggested by NAB,[11] that the percentages of programming costs are the means by which we determined music's commercial radio share. To do so would be to imply a rationale that we have consistently rejected in the past: The strict application of a formula. This is inconsistent with conclusions we have drawn from the record in the past and unsupported by any

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[8] Tr. p. 2610, 1979 proceeding.

[9] National Association of Broadcasters 1979 Findings of Fact Calculation Appendix, pp. 1-7.

[10] Music 1979 Findings of Fact, pp. 16-17.

[11] National Association of Broadcasters Supplemental Findings of Fact, p. 5, 1979.

comparative reading of the programming expense figures for 1978 and 1979.[12]

Commercial Radio

For the third time we have heard the evidence presented by NAB seeking to persuade us to make an award to commercial radio. We again decline to do so. As with the arguments advanced by NAB, the reasons for our denial remain unchanged. We reaffirm the findings of our previous determinations.[13]

NAB takes umbrage at our determination to include some compensation to Music for the performance of music on distant radio signals, but to deny any award to commercial radio. We hold that in a very substantial degree any value of distant commercial radio signals is attributable to music, and that the non-musical program elements of these signals is of negligible value. We likewise hold that the broadcaster's format is of no significant value independent of that attributable to music.

We hold that commercial radio has again failed to establish that it has any significant copyrightable interests on which to base a claim. We concur in the finding of National Public Radio that "disc jockey time is the least attractive part of a commerical radio hour."[14] We find nothing in the 1980 record to alter our previous conclusions as to the massive duplication of locally available commercial radio formats by distant commercial signals. In particular, the NAB study of radio formats when subjected to examination, and the SRI study on the value of distant commercial

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[12] MPAA Findings of Fact, p. 132; Joint Sports Findings of Fact, p. 156; TR. p. 4143, 1979.

[13] 45 FR 63040 and 49 FR 20051.

[14] Proposed Findings of Fact and Conclusions of Law of NPR, p. 52, 1980.

radio signals do not require an alteration of our general assessment of the commercial radio claim.[15]

The Tribunal continues to believe that no award for the broadcaster's portion of distant signal commercial radio is justified based on the record evidence. In so judging, the Tribunal is referring only to the portion of commercial radio which is directly the creation of, and attributable to, the broadcasters. The Tribunal reviewed the record evidence and remains unable to discern any measurable marketplace value or benefit to the cable operator of the broadcasters' contribution on distant signal commercial radio, other than one so small as to be practically uncompensable. We find ourselves in agreement with the Court of Appeals, which rejected NAB's contention that its non-award in the 1979 distribution proceeding is unsupported by substantial evidence, and, on the contrary, found there is substantial evidence in the record to support the Tribunal's conclusion that commercial radio's value in the cable marketplace is sufficiently *de minimus* as not to warrant an award.[16]

In reaching such a conclusion the Tribunal relied more than customarily upon time-based consideration. Normally the Tribunal has refrained from looking to time-based considerations as a justification for our decisions because of their failure to differentiate between the conditions in local broadcast markets and distant cable markets; but in the case of commercial radio no other useful measurable standard was provided. Concerning the relative significance of commercial radio as a distant signal, we relied on the testimony of Mr. Abrams.[17] But because of his lack of

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[15] Proposed Findings of Fact and Conclusions of Law of Joint Sports Claimants, pp. 160-163, 1980.

[16] TR. pp. 2567-71, testimony of Ms. Hall, Storer Cable; TR. p. 2708, testimony of Mr. Abrams, Radio Programming Expert, 1979.

[17] TR. p. 2708, 1979.

familiarity with distant signal cable market itself[18] and because of the unavoidable subjectivity of his judgments concerning the contribution of broadcasters,[19] we were unable to rely on his testimony with regard to the value that should be placed upon the broadcasters' share and upon formatting. We concur in the finding of Music that the "claim for radio formatting is simply a compilation claim applied to radio,"[20] and we have consistently downgraded programming we have found duplicative.

The degree to which the broadcaster's share may also be strictly local in interest further clouds the value that may be attributable to non-music copyrighted programming.[21]

We therefore continue to conclude that although a small but undeterminable award is justifiable for music for commercial radio, no award is appropriate for commercial radio broadcasters themselves.

ADJUSTMENT OF PHASE I AWARDS

The Tribunal's award of 0.35% to the Devotional Claimants has required the Tribunal to review the entire Phase I allocation. The Settling Parties on May 6, 1983 filed with the Tribunal an "Agreement of Settlement and Compromise." The Agreement provided, in part, that any award to Devotional Claimants in the 1980 proceeding as a result of the Court's decision in the 1979 case "shall be taken proportionately from the shares of all those receiving Phase I awards in such Proceedings (except that NPR's share shall not be reduced)."

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[18] TR. p. 2707, 1979.

[19] TR. p. 2611, 1979.

[20] Proposed Findings of Fact and Conclusions of Law Submitted by Music, p. 18, 1980.

[21] TR. p. 2665-67, 1979.

The Tribunal accepts the proposal of the Settling Parties as reasonable. As in our 1979 remand determination,[22] we are guided by a desire to preserve as best as possible our original assessment of the claims, modified to make provision for the award to the Devotional Claimants. The Tribunal's adoption of the proposal of the Settling Parties in this proceeding does not control the Tribunal's disposition of any similar issue in subsequent proceedings.[23]

It is therefore ordered that the following allocation be made to categories of Phase I claimants.

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[22] 49 FR 20051.

[23] Following the adoption of the Tribunal's final determination in the 1979 cable royalty remand proceeding, counsel for the Program Suppliers filed on May 10, 1984 a request for reconsideration by the Tribunal of its decision to exclude certain awards from the impact of the 1979 remand award to the Devotional Claimants. Program Suppliers asserted that the "only course open is for the Tribunal to take the Devotional Claimants' award 'off the top,' and then to distribute the remaining percentage among the other parties in the same proportion received in the original, affirmed decision." But in the 1980 proceeding Program Suppliers assert that the Tribunal has jurisdiction to exclude the NPR award from the adjustment required by the award to Devotional Claimants. The Tribunal in resolving the 1980 remand has not found it necessary to address the question of whether the Court's order permits the Tribunal to conduct further proceedings on issues not directly related to the Court's opinion in the 1979 case, nor have we found it necessary to compare the Court's 1979 and 1980 orders as to the scope of the Tribunal's jurisdiction on remand. We note that counsel for the Program Suppliers, appearing for the Settling Parties, argued to the Tribunal on February 21, 1984 that the Court's 1980 order should be viewed "simply as an expedient way of trying to get both cases on track." (1979 Remand Oral Argument, Transcript p. 44).

	Percent
1. Motion Picture Association of America and other program syndicators	69.7544
2. Joint Sports Claimants and NCAA	14.9473
3. Public Broadcasting Service (for all purposes)	5.2316
4. U.S. Television Broadcasters (for all copyrightable interests except program syndication)	4.4842
5. Music Performing Rights Societies	4.2351
6. Canadian Television Broadcasters (to exclude all radio claims)	.7474
7. Devotional Claimants	.35
8. National Public Radio	.25
9. Commercial Radio	.0

Commissioner Brennan has additional views.

Thomas C. Brennan,
Chairman.
July 5, 1984.

ADDITIONAL VIEWS OF COMMISSIONER BRENNAN

The record of the original 1980 proceeding includes my letter of February 18, 1983 explaining the basis for my vote to adopt the Tribunal's final determination in the 1980 distribution proceeding. In a multi-member body, it is necessary to achieve a consensus if any determination is to be approved. The letter recorded my reservations concerning the "rationale adopted" and indicated that my vote would not control my position in subsequent distribution proceedings. My vote now to readopt most of the 1980 opinion is subject to the reservations of my February 18th letter, and in no way alters positions asserted by this commissioner during the 1980 proceeding.

APPENDIX F

49 Fed. Reg. 20048 (1984)

COPYRIGHT ROYALTY TRIBUNAL

[Docket No. CRT 80-4]

1979 Cable Royalty Distribution Determination

AGENCY: Copyright Royalty Tribunal.

ACTION: Notice of Final Determination.

SUMMARY: The Copyright Royalty Tribunal (Tribunal) announces the adoption of its final determination in the proceeding concerning the remand issues of the distribution of royalty fees paid by cable systems for secondary transmissions during 1979.

FOR FURTHER INFORMATION CONTACT: Thomas C. Brennan, Chairman, Copyright Royalty Tribunal, 1111 20th Street, NW, Room 450, Washington, DC 20036. (202) 653-5175.

INTRODUCTION

The Tribunal on March 8, 1982 published in the **Federal Register** (47 FR 9879) its final determination in the proceeding for the distribution of the 1979 cable royalties. Appeals of this determination were taken by several parties. The United States Court of Appeals for the District of Columbia Circuit in Christian Broadcasting Network v. Copyright Royalty Tribunal, 720 F.2d 1295 (D.C. Circuit 1983) affirmed the Tribunal's decision in nearly all respects, but remanded three issues for further tribunal proceedings. These issues related to the allocation of the royalties for sports programming, the Tribunal's zero awards to the Devotional Claimants, and the Tribunal's treatment of the commercial radio claims and the radio portion of the award to Music. By an order published in the **Federal Register**

of December 13, 1983, (48 FR 55498) the Tribunal established procedures for the consideration of the remand issues. The sports royalty issue was resolved in an order published in the **Federal Register** of January 31, 1984 (49 FR 3899). With regard to the devotional and commercial radio issues, Opening Briefs were submitted on February 1, 1984, followed by the submission of Replies on February 15, 1984. Oral argument was held February 21, 1984, with supplemental Proposed Findings of Fact and Conclusions of Law submitted March 1, 1984. No additional evidence on these issues was taken.

The Tribunal issued on March 16, 1984 an interim order resolving that the Tribunal had determined to make an award to the Devotional Claimants, and requesting parties to submit proposals as to the amount of the award to the Devotional Claimants, and the justification for the proposed award. These proposals were submitted on April 4, 1984.

DISTRIBUTION CRITERIA

In the Tribunal's 1978 determination we set forth the criteria by which we judged the evidence in that distribution proceeding and which we intended to apply in subsequent proceedings.[1] The 1979 proceeding was the first distribution proceeding in which the claimants had the opportunity to present evidence in support of their claim, subsequent to the adoption of the Tribunal's distribution criteria. Consequently the Tribunal was able to readjust awards in conformity with these criteria more closely in the 1979 proceeding. For this reason, together with the somewhat inherently subjective nature of these determinations, the Tribunal concluded that it was reasonable in the 1979 proceeding to alter awards made to claimants in the 1978 determination, given a greater refinement in our ability to assess a claimant's overall case and weigh even

[1] 45 FR 63035-37

unchanged evidence more accurately. This approach of the Tribunal was one of many issues presented in the appeals of our 1979 determination. We adhere to our view that the approach is reasonable for the 1979 proceeding.

DEVOTIONAL CLAIMANTS

Introduction

The Tribunal in reviewing all the evidence in the 1979 record relating to the case of the Devotional Claimants, the opinion of the U.S. Court of Appeals, the remand pleadings, and the oral argument has not been persuaded that any significant modification of our original assessment of the case of the Devotional Claimants is either required or justified by the record. Our initial determination to award no royalties was influenced by what we have viewed as the special factors of the Devotional claims—the purchase of broadcast time, and certain perceived benefits to such claimants from cable retransmission. We have resolved in this proceeding to give less weight to these factors. It is this decision which is the immediate basis of our determination to now make an award to the Devotional Claimants.

BENEFIT TO CABLE SYSTEMS AND MARKETPLACE VALUE

We have concluded, as in our consideration of other claims, that particular attention should be paid to the benefit and marketplace value criteria. The record does contain some evidence presented by the Devotional Claimants on the benefit issue. The Court cited in the record "what appears to be at least noteworthy of 'benefit to cable operators.' "[2] But none of this evidence, in our view, significantly

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[2] Christian Broadcasting Network v. Copyright Royalty Tribunal, 720 F.2d at 1310

bolsters the devotional claims on the benefit standard,[3] or can remotely be deemed similar to that which we have found to be supportive of the case of the sports claimants. We do not find in the record any basis for concluding that cable operators chose distant signals because of devotional programming, nor have we been persuaded, based on this record, that cable operators welcome the inclusion of devotional programs on distant signals to balance the carriage of secular programs.

We also fail to find in this record support for the contention of Devotional Claimants that their benefit to cable operators is similar to that of the Public Broadcasting System (PBS). Nether [*sic*] in the timing of the telecast or the program mix do we find that the Devotional Claimants can be viewed as affording the alternative to the commercial networks provided by PBS.

In our 1979 determination,[4] we found that "we have not discovered a marketplace value for the programs of these claimants." A second look at the evidence has not persuaded us to alter this conclusion.

The Devotional Claimants cite the "wide distribution received by Devotional progamming" as a measure of marketplace value.[5] We find no basis in this record for "linkage" between the presence of devotional programs and the distant carriage of a particular station. We concur in the Proposed Findings of the Settling Parties, for example with regard to WOR-TV, Secaucus, New Jersey, that "there is considerable evidence that WOR was carried for various

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[3] See analysis of this evidence in Settling Parties Proposed Findings, pp 28-29

[4] 47 FR 9896

[5] Devotional Claimants, Supplemental Proposed Findings, p. 18

other reasons", that is because of non-devotional programming.[6]

HARM FROM CABLE RETRANSMISSION

The Devotional Claimants in their Supplemental Proposed Findings assert that the "predominant thrust of the harm suffered; [*sic*] by the Devotional Claimants stems from the loss of control over the use of their copyrighted product that results from the compulsory licensing scheme."[7] A specific application of this harm is said to be "audience fragmentation." We stated in our 1979 opinion that in determining an award to Old Time Gospel Hour (OTGH) we did not find this theory "convincing." The Court of Appeals in its opinion quoted from the Tribunal's explanation in our 1978 opinion of the harm criteria[8] in which we spoke of "a further adverse economic impact on a copyright owner from the importation of competing distant works into the aggrieved party's local community." We find no conflict between this general language and the application of the harm standard to the specific claim of OTGH, but we need not base our position in this proceeding on such a distinction. We do not find in this record any evidence regarding the factors that would have to be considered in establishing such loss.

The Devotional Claimants assert that another harm to them is "viewer confusion caused by program duplication and the inherent problems in scheduling and promoting their product where duplicative material is impacted on a distant signal."[9] We find that the actual record in this proceeding is more correctly reflected in the Settling Par-

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[6] Settling Parties, Supplemental Proposed Findings, p 23

[7] Devotional Claimants Supplemental Proposed Findings, p 4

[8] CBN v. CRT, 720 F.2d at 1312

[9] Devotional Claimants Supplemental Proposed Findings, pp 5-8

ties Supplemental Proposed Findings that "no witness supported this claim with a single instance of viewer complaints or decreased contributions concerning Devotional Claimants' own duplicative local programming purchases." [10]

A third application of the harm criteria cited by the Devotional Claimants is the assertion of harm to the satellite networks of PTL and CBN because of distant signal importation. The Court has stated: "To the extent that the Tribunal refused to recognize general revenue loss from these claimants' inability to 'place' their satellite networks —beyond the specific, marginal loss of prime time contributions from their copyrighted programs—we agree." But the Court held that if the "Devotional Claimants can prove (to the Tribunal's satisfaction) that cable retransmission has measurably diminished their ability to exploit the contribution potential of their particular works, whether by satellite or otherwise, we see no reason why such an opportunity loss would fall outside the scope of section 111 of the Act." We find no evidence in the 1979 record to support an award on this basis for harm to satellite networks.

SECONDARY CRITERIA

We find; [*sic*] nothing in the Court's opinion which requires further discussion as to the application to the Devotional Claimants of the secondary criteria of quality and time. We have rejected time-based formulas and we continue to believe that time is not a valid criterion of marketplace value.

SPECIAL FACTORS

The Court of Appeals recognized that the purchase of broadcast time by Devotional Claimants was "the basis for a reasonable inference that their programming is without recognizable value," but stated that the Tribunal had

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[19] Settling Parties Supplemental Proposed Findings, p 11

not discussed the contention "that their payments to broadcasters reflect a conscious, self-inflicted cost of commercial-free formatting rather than any external indication of market worthlessness." We continue to read the revelant evidence on this issue as consistent with the Tribunal's conclusion, but this issue is not central to our determination in this proceeding. If evidentiary hearings are necessary in subsequent distribution proceedings, the Tribunal will expect the parties to present a fuller record on this issue.

The Court also said that the Tribunal did not acknowledge the counter-argument of the Devotional Claimants that the market value of their programming is reflected in the value viewers place on it by making donations. We doubt that there is a direct relationship between donations and the value of the programs as distinguished from support of the full gambit of religious and other activities of these claimants, but again this issue is not a significant factor in our award in this proceeding.

In our 1979 opinion we concluded that distant carriage may well benefit the Devotional Claimants by providing expanded coverage and the potential for increased contributions. We continue to believe that this is a plausible conclusion, and that our treatment of other claimants on this issue is not inconsistent. We reject the argument that the situation of the Devotional Claimants as to benefit from distant cable carriage is identical to that of PBS and NPR. This distinction is rooted, on the one hand on the practices of the Devotional Claimants to encourage cable carriage of their programs by satellite networks, and on the other by public broadcasting's mandate to encourage development of local public television, and radio stations.

This "negative harm" issue is not a significant factor in this determination, but if evidentiary hearings are necessary in subsequent distribution proceedings, the Tribunal will expect the parties to further develop the record on this issue. We cannot, however, leave unanswered the Court's

language that "we are troubled by the unexplained vengeance" with which the Tribunal is said to have applied the "negative harm" test to the Devotional Claimants.[11] We have stated that the harm criteria has been of limited utility in allocating the cable fund. Our point has been that the commercial and public broadcasting claimants sustain some harm, however vaguely defined, from distant signal carriage, but that for the reasons discussed above the Devotional Claimants may not sustain a net loss. This conclusion is not motivated by "vengeance" but by our analysis of the record. We leave "vengeance" to other authority.[12]

TREATMENT OF OTHER CLAIMANTS

We now address matters which have been raised concerning our treatment of other claimants in relation to the Devotional Claimants. The Devotional Claimants assert that the most obvious comparison is with public broadcasting. We again reject this relationship. The Devotional Claimants present only a single program, while public broadcasting offers a range of programs, that in its diversity attracts a broad range of audience. The carriage of the public broadcasting signals indicates the appeal of their programming. Devotional programming is but a small portion of a distant signal. Therefore, the carriage of that signal does not establish the appeal of devotional programming. As to contributions, the funds donated to public broadcasting have no purpose other than to support the programs, while contributions to the Devotional Claimants have a less direct connection to the programming.

In response to our order of March 16, 1984, PBS submitted an analysis of distant cable carriage of public and religious specialty stations. While we do not adopt the spe-

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[11] CBN v. CRT 720 F. 2d at 1311

[12] See Romans, XII, 19

cific analyses, we believe that it provides a useful measure to judge our respective awards to these claimants.[13]

MUTUAL OF OMAHA

The Devotional Claimants have viewed Mutual of Omaha as one of the claimants "similarly situated." We do not agree that Mutual, because it does not receive money for its bartered program "Wild Kingdom," is similar to the Devotional Claimants. Mutual offers advertising availabilities to local stations, and must persuade the local station that the revenues from these availabilities will make it worthwhile to broadcast the program. In contrast, the purchase of time does not represent any determination as to the value of the programming, but only a business judgment as to the amount of money offered.

In response to our order of March 16, 1984, the Settling Parties presented an analysis of "Wild Kingdom" compared with the major program for each of the Devotional Claimants on the basis of Arbitron ADI ratings and ADI households for approximately 350 syndicated programs in 1979.[14] While we do not adopt the specific analysis as the basis for our award to the Devotional Claimants, it provides a measure of our respective awards to these claimants.

NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

The Devotional Claimants claim that the "Tribunal's treatment of the Devotional Claimants versus NAB is similarly uneven and unfair."[15] Devotional Claimants call attention to the Tribunal's determination of the NAB claim

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[13] The Proposal of Public Broadcasting Service for an award to the Devotional Claimants, pp 6-8.

[14] Settling Parties Proposal, pp. 3-4.

[15] Devotional Claimants' Supplemental Proposed Findings, p 47.

both as to its Phase I local broadcaster entitlement and its Phase II program syndicator award. The Tribunal in both the 1978 and 1979 determinations was critical of the NAB showing under the primary criteria. While no formula was applied in determining our Phase I award to NAB, the award reflected a very substantial downward adjustment in the 19% time and 8% viewing percentages attributable to local broadcasters in the Motion Picture Association of America (MPAA) Nielsen Report. In response to our order of March 16, 1984, the Settling Parties and PBS presented two analyses of our NAB award in relation to the distant viewing of local station programming and devotional programs. While we do not adopt these specific analyses as the basis of our award to the Devotional Claimants, they provide a measure of our respective awards to these claimants.

With regard to our Phase II award to NAB as a program syndicator, it is correct as noted by the Devotional Claimants that we found that "the data NAB presented with respect to the secondary carriage of station syndication was insufficient." We accordingly made a substantial reduction in the award sought by NAB.

Award to Devotional Claimants

In accordance with the above, the record evidence, and our review of awards made to other claimants, we award 0.5% of the Program Syndicators' share to the Devotional Claimants. The Devotional Claimants have informed the Tribunal that they have reached a voluntary agreement for the division among themselves of this award.

ADJUSTMENT OF PHASE II PROGRAM SYNDICATORS ALLOCATION

The Tribunal's award of 0.5% of the Program Syndicator's share to the Devotional Claimants has required the

Tribunal to review the entire Program Syndicator allocation. In our 1979 determination we observed that our comparative analysis of Phase II claims was "restricted by the state of the record."[16] Because of the record in the 1979 proceeding, and its inherent impact on the consideration of claims during Phase II, we have resolved that the Tribunal's overall assessment of the Phase II issues and the cases presented is best preserved by reducing our award to MPAA and associated syndicators by 0.5%, and leaving other Phase II awards unchanged. This disposition applies only to the particular circumstances of the 1979 proceeding.

It is therefore ordered that the 1979 Program Syndicators allocation be revised to read as follows:

Motion Picture Association of America	96.3
Multimedia Program Productions, Inc.	1.6
National Association of Broadcasters	0.8
Spanish International Network	0.7
Devotional Claimants	0.5
Mutual of Omaha	0.1

MUSIC AND COMMERCIAL RADIO CLAIMANTS

With regard to its awards to music and broadcasters for commercial radio, the Tribunal agrees with the Court's findings that the justification for our decision contained inconsistencies and imprecisions. The Tribunal was remiss in ineptly and inaccurately articulating in its 1979 decision views which we held then to be supported by the record evidence and which remain unshaken upon remand and an additional review of the record. The Tribunal regrets the impression of its earlier justification, accepts the Court's admonition, and welcomes the opportunity to present the foundations for its decision with greater clarity.

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[16] 47 FR 9895.

COMMERCIAL RADIO

The Tribunal continues to believe that no award for the broadcaster's portion of distant signal commercial radio is justified based on the record evidence. In so judging, the Tribunal is referring only to that portion of commercial radio which is directly the creation of, and attributable to, the broadcasters. The Tribunal reviewed the record evidence and the arguments made on remand, and remains unable to discern any measurable marketplace value or benefit to the cable operator of the broadcasters' contribution to distant signal commercial radio, other than one so small as to be practically uncompensable. We find ourselves in agreement with the Court of Appeals, which rejected NAB's contention that its non-award is unsupported by substantial evidence, and, on the contrary, found there is substantial evidence in the record to support the Tribunal's conclusion that commercial radio's value in the cable marketplace is sufficiently *de minimus* as not to warrant an award.[17]

In reaching such a conclusion the Tribunal relied more than customarily upon time-based considerations. Normally the Tribunal has refrained from looking to time-based considerations as a justification for our decisions because of their failure to differentiate between the conditions in local broadcast markets and distant cable markets; but in the case of commercial radio no other useful measurable standard was provided. Concerning the relative significance of commercial radio as a distant signal, we relied on the testimony of Mr. Abrams.[18] But because of his lack of familiarity with the distant signal cable market itself [19] and because of the unavoidable subjectivity of his judg-

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[17] TR. pp. 2567-71, testimony of Ms. Hall, Storer Cable; TR. p. 2708, testimony of Mr. Abrams, Radio Programming Expert.

[18] TR. p. 2708.

[19] TR. p. 2707.

ments concerning the contribution of broadcasters,[20] we were unable to rely on his testimony with regard to the value that should be placed upon the broadcasters' share and upon formatting. We concur in the finding of Music that the "claim for radio formatting is simply a compilation claim applied to radio," and we have consistently downgraded programming we have found duplicative.

The degree to which the broadcaster's share may also be strictly local in interest further clouds the value that may be attributable to non-music copyrighted programming.[21]

MUSIC

Upon reviewing the 1979 record and arguments on remand, the Tribunal continued to find music justified to an award for distant cable radio carriage; however, because the value of commercial radio generally in the cable marketplace is *de minimus,* this award is very small.

The Tribunal considered only two tangible pieces of evidence in the record helpful as a basis upon which to make a judgment: (1) That commercial radio is in fact carried as a distant signal, and (2) that this carriage is overwhelmingly music. In addition, we relied on the testimony of Mr. Abrams concerning the preponderance of music on radio signals.[22] These considerations shed no light on the true worth of commerical radio programming in distant signal markets; however they left unassailable the simple fact that the vast bulk of that programming is music; just as the vast bulk of programming on distant cable televison is that of the Program Suppliers, to whom no one has denied the right to the preponderant share of those royalties, including NAB.[23] In our findings, we wished to declare that

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[20] TR. p. 2611.

[21] TR. p. 2665-67.

[22] TR. p. 2610.

[23] National Association of Broadcasters 1979 Findings of Fact Calculation Appendix, pp. 1-7.

for radio music is the proper recipient for whatever *de minimus* unquantifiable award there may be.

The inconsistency in our previous decision resulted from our failure to state that, although we judged that such an award was justified, we were unable to quantify it and found it uncalculable and extremely small. Cable operators receive some benefit in being able to offer commercial radio as a distant signal, as evidenced by the fact that it is carried, but that value is undeterminable, and to the extent that it exists is overwhelming [*sic*] attributable to music by the only measure available—time.

In employing the time criterion, as a basis for our judgment, the Tribunal rejected a proposal by the music claimants that we employ the percentage of programming costs.[24] No inferences, therefore, may be drawn, as suggested by NAB,[25] that the percentages of programming costs are the means by which we determined music's commercial radio share. To do so would be to imply a rationale that we have consistently rejected in the past: The strict application of a formula. This is inconsistent with conclusions we have drawn from the record in the past and unsupported by any comparative reading of the programming expense figures for 1978 and 1979.[26]

Commissioner Brennan has separate views.

Thomas C. Brennan,

Chairman.

May 8, 1984.

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[24] Music 1979 Findings of Fact, pp. 16-17.

[25] National Association of Broadcasters Supplemental Findings of Fact, p. 5.

[26] MPAA Findings of Fact, p. 132; Joint Sports Findings of Fact, p. 156; TR. p. 4143.

SEPARATE VIEWS OF COMMISSIONER BRENNAN

I concur in that portion of the Tribunal's Commercial Radio/Music determination denying any award to commercial broadcaster claimants for distant cable carriage of commercial radio signals. The Court of Appeals has held that "there is substantial evidence in the record to support the Tribunal's conclusion that commerical radio's value in the cable marketplace is sufficiently *de minimus* as not to warrant an award."

In the 1979 proceeding I did not agree with the Tribunal's award to the Music claimants, nor with the justification advanced for that award. In the current proceeding I abstain on that portion of the Tribunal's Commercial Radio/Music determination relating to the award of the Music claimants.

APPENDIX G

17 U.S.C. § 111(d) Compulsory License for Secondary Transmissions by Cable Systems.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall, at least one month before the date of the commencement of operations of the cable system or within one hundred and eighty days after the enactment of this Act, whichever is later, and thereafter within thirty days after each occasion on which the ownership or control or the signal carriage complement of the cable system changes, record in the Copyright Office a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it, together with the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system, and thereafter, from time to time, such further information as the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), shall prescribe by regulation to carry out the purpose of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, on a semiannual basis, deposit with the Register of Copyrights, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), prescribe by regulation—

> (A) a statement of account, covering the six months next preceding, specifying the number of channels on which the cable system made secondary transmissions to its subscribers, the names and locations of all primary transmitters whose transmissions were further transmitted by the cable system, the total number of

subscribers, the gross amounts paid to the cable system for the basic service of providing secondary transmissions of primary broadcast transmitters, and such other data as the Register of Copyrights may, after coonsultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), from time to time prescribe by regulation. Such statement shall also include a special statement of account covering any nonnetwork television programming that was carried by the cable system in whole or in part beyond the local service area of the primary transmitter, under rules, regulations, or authorizations of the Federal Communications Commission permitting the substitution or addition of signals under certain circumstances, together with logs showing the times, dates, stations, and programs involved in such substituted or added carriage; and

(B) except in the case of a cable system whose royalty is specified in subclause (C) or (D), a total royalty fee for the period covered by the statement, computed on the basis of specified percentages of the gross receipts from subscribers to the cable service during said period for the basic service of providing secondary transmissions of primary broadcast transmitters, as follows:

(i) 0.675 of 1 per centum of such gross receipts for the privilege of further transmitting any nonnetwork programing of a primary transmitter in whole or in part beyond the local service area of such primary transmitter, such amount to be applied against the fee, if any, payable pursuant to paragraphs (ii) through (iv);

(ii) 0.675 of 1 per centum of such gross receipts for the first distant signal equivalent;

(iii) 0.425 of 1 per centum of such gross receipts for each of the second, third, and fourth distant signal equivalents;

(iv) 0.2 of 1 per centum of such gross receipts for the fifth distant signal equivalent and each additional distant signal equivalent thereafter; and

in computing the amounts payable under paragraph (ii) through (iv), above, any fraction of a distant signal equivalent shall be computed at its fractional value and, in the case of any cable system located partly within and partly without the local service area of a primary transmitter, gross receipts shall be limited to those gross receipts derived from subscribers located without the local service area of such primary transmitter; and

(C) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement for the basic service of providing secondary transmissions of primary broadcast transmitters total $80,000 or less, gross receipts of the cable system for the purpose of this subclause shall be computed by subtracting from such actual gross receipts the amount by which $80,000 exceeds such actual gross receipts, except that in no case shall a cable system's gross receipts be reduced to less than $3,000. The royalty fee payable under this subclause shall be 0.5 of 1 per centum, regardless of the number of distant signal equivalents, if any; and

(D) if the actual gross receipts paid by subscribers to a cable system for the period covered by the statement, for the basic service of providing secondary transmissions of primary broadcast transmitters, are more than $80,000 but less than $160,000, the royalty fee payable under this subclause shall be (i) 0.5 of 1

per centum of any gross receipts up to $80,000; and (ii) 1 per centum of any gross receipts in excess of $80,000 but less than $160,000, regardless of the number of distant signal equivalents, if any.

(3) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on a semiannual basis, a compilation of all statements of account covering the relevant six-month period provided by clause (2) of this subsection.

(4) The royalty fees thus deposited shall, in accordance with the procedures provided by clause (5), be distributed to those among the following copyright owners who claim that their works were the subject of secondary transmissions by cable systems during the relevant semiannual period:

(A) any such owner whose work was included in a secondary transmission made by a cable system of a nonnetwork television program in whole or in part beyond the local service area of the primary transmitter; and

(B) any such owner whose work was included in a secondary transmission identified in a special statement of account deposited under clause (2)(A); and

(C) any such owner whose work was included in nonnetwork programming consisting exclusively of aural signals carried by a cable system in whole or in part

beyond the local service area of the primary transmitter of such programs.

(5) The royalty fees thus deposited shall be distributed in accordance with the following procedures:

(A) During the month of July in each year, every person claiming to be entitled to compulsory license fees for secondary transmissions shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(B) After the first day of August of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If the Tribunal finds the existence of a controversy, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(C) During the pendency of any proceeding under this subsection, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

17 U.S.C. § 803 Procedures of the Tribunal.

(a) The Tribunal shall adopt regulations, not inconsistent with law, governing its procedure and methods of operation. Except as otherwise provided in this chapter, the Tribunal shall be subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, chapter 5, subchapter II and chapter 7).

(b) Every final determination of the Tribunal shall be published in the Federal Register. It shall state in detail the criteria that the Tribunal determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination.

No. 85-926

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CHRISTIAN BROADCASTING NETWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF FOR RESPONDENTS OLD-TIME GOSPEL HOUR AND PTL TELEVISION NETWORK IN SUPPORT

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January 22, 1986

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QUESTIONS PRESENTED

The questions presented for review are as set forth by Petitioner, The Christian Broadcasting Network, Inc. (CBN).

LIST OF PARTIES

The list of parties in the consolidated cases below, Nos. 84-1230 *et al.* and 84-1519 *et al.* is as set forth by CBN.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NO. 85-926

THE CHRISTIAN BROADCASTING NETWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

BRIEF FOR RESPONDENTS OLD-TIME GOSPEL HOUR AND PTL TELEVISION NETWORK IN SUPPORT

Respondents Old-Time Gospel Hour (Old-Time) and PTL Television Network (PTL)[1] herewith support the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by The Christian Broadcasting Network, Inc. (CBN), seeking review of the Opinion and Order filed August 20, 1985 jointly in *National Association of Broadcasters* v. *Copyright Royalty Tribunal*, D.C. Cir. Nos. 84-1230 *et al.* and in *The Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal*, D.C. Cir. Nos. 84-1519 *et al.*,

[1] Formally incorporated as Heritage Village Church and Missionary Fellowship, Inc.

affirming the final determinations of the Copyright Royalty Tribunal (CRT or Tribunal) as to distributions of copyright royalties for cable television retransmission of copyrighted works for the years 1979, 1980 and 1982.

Respondents' brief in support of petitioner is submitted pursuant to Rule 21(4) of this Court.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

The opinions below, jurisdiction, statutes involved and statement of the case are as set forth by CBN.

REASONS FOR GRANTING THE WRIT

Old-Time and PTL concur with CBN's stated reasons for granting the writ, particularly with respect to the split between the Circuits. Indeed, those reasons are enhanced by focusing attention on the testimony of the Tribunal's then Acting Chairman in hearings on Copyright Royalty Tribunal Reform before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. That testimony followed the Second Circuit's decision in *Acemla* v. *Copyright Royalty Tribunal*, 763 F.2d 101 (2d Cir. 1985). There it was decided that the Tribunal erred in permitting ASCAP and BMI, on the mere strength of an agreement and without presenting a case, to reap the spoils of all juke box royalties to which entitlement was not otherwise proven by a non-agreeing claimant. Hoping the District of Columbia Circuit would not follow suit, the Acting Chairman correctly predicted a split between it and the Second Circuit on the first issue advanced by CBN, *i.e.*, whether the Tribunal has authority to allocate royalty funds to claimants who have not proved their entitlement. Interestingly the Acting Chairman's solution to the impending conflicting decisions between the Circuits is to abolish judicial review in any Circuit but the District of

Columbia Circuit. The Tribunal's position is:

> *Judicial Review.* The Tribunal is currently faced with a potential split with the Second Circuit and the D.C. Circuit Courts of Appeals. The Second Circuit has recently decided a case involving the burden of proof of settling parties versus non-settling parties. The D.C. Circuit has a similar issue pending in another distribution proceeding. The Tribunal recommends that the Copyright Act be amended to allow that no court other than the United States Court of Appeals for the District of Columbia [Circuit] shall have jurisdiction to review a final decision of the Copyright Royalty Tribunal.[2]

As CBN points out, "The result reached below is in direct conflict with the Decision reached three months earlier by the Second Circuit in *Acemla* ..." *supra.* Legislative reform of the Copyright Royalty Tribunal is stalled, and there is no reason to suppose that the Tribunal's wish will come true. A split in the Circuits will remain, and absent unexpected Congressional action it can be presumed that appeals will be filed at Circuits other than the District of Columbia. Cable television royalty distributions are an annual event, now about $100 million each. So far there has never been a universal settlement among the claimants.[3] The matter of the "burden of proof of settling parties versus non-settling parties" is very likely to arise again in future years' litigation, especially inasmuch as heretofore the non-settling parties have not

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[2] Hearings on Copyright Royalty Tribunal Reform before the House Subcom. on Courts, Civil Lib. and Admin. of Justice, 99th Cong., 1st Sess. (Testimony of The Honorable Edward W. Ray, July 11, 1985 at p. 8) (Unpublished).

[3] Other than an agreement as to one year to accept the same percentage as finally awarded in another year.

occupied that position by choice but, instead, only in the face of unreasonable settlement offers.

As is set forth in the seminal treatise by Messrs. Stern and Gressman, certiorari jurisdiction has as one of its major purposes uniformity of decisions among federal courts of appeals, "hence a square and irreconcilable conflict of this nature *ordinarilly* will be enough to secure review." R. Stern and E. Gressman, *Supreme Court Practice*, 265 (5th ed. 1978). Cited in support are *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 559 (1968) where this court stated "[w]e granted the petition for certiorari . . . because of an apparent conflict between the decision below [by the Sixth Circuit] and [one] from the Court of Appeals for the Third Circuit." Also cited is *Northeastern Pennsylvania National Bank* v. *United States*, 387 U.S. 213, 217 (1967) where it was stated that "[b]ecause of an acknowledged conflict between . . . " the Third and Seventh Circuits "we granted certiorari." Clearly we have here an acknowledged direct conflict between the Circuits, the acknowledgment coming from no less than the Tribunal itself.

CONCLUSION

For the reasons set forth above and by CBN the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 22, 1986

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Respondent's Brief in Support of the Petition for Writ of Certiorari upon the persons indicated below by depositing same in the United States mail, first-class postage prepaid, addressed to the following:

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Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
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(3)

No. 85-926

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTIAN BROADCASTING NETWORK, INC.,
PETITIONER

v.

COPYRIGHT ROYALTY TRIBUNAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-926

CHRISTIAN BROADCASTING NETWORK, INC.,
PETITIONER

v.

COPYRIGHT ROYALTY TRIBUNAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner is one of numerous claimants to the cable television royalty fund distributed for 1979, 1980, and 1982 by the Copyright Royalty Tribunal pursuant to the Copyright Act of 1976, 17 U.S.C. (& Supp. II) 101 *et seq.* Petitioner, alone among these claimants (see page 3 note 2, *infra*), seeks review of the court of appeals' decision affirming the Tribunal's awards. It contends that the Tribunal's procedures were improper and that the Tribunal engaged in unconstitutional religious discrimination.

1. The Copyright Act establishes a system of compulsory licensing for secondary transmissions of programs by cable television stations. See 17 U.S.C. 111(d). Under the Act, the Copyright Royalty Tribunal is responsible for annually distributing to copyright owners the royalty fees deposited with the Register of Copyrights by cable television operators. See 17 U.S.C. 111(d)(2)-(4). In implementing this system, the Tribunal, which is part of the legislative branch (see

17 U.S.C. 801(a)), is necessarily required to make "inherently subjective judgment calls and [engage in a] rough balancing of hotly competing claims" (Pet. App. 37a). "[R]ough justice in dividing up the royalty pie seems to be the inevitable result of the process that Congress ordained" (*id.* at 9a), and "royalty awards * * * [must only be] within a 'zone of reasonableness'—not unreasonably high or unreasonably low" (*ibid.* (citation omitted)). Royalty awards of the Tribunal are subject to judicial review in accordance with the provisions of the Administrative Procedure Act, 5 U.S.C. (& Supp. II) 701 *et seq.* See 17 U.S.C. 810; Pet. App. 8a-9a.

The Copyright Act encourages claimants to come to an agreement concerning the proper distribution of the royalty fund. See 17 U.S.C. 111(d)(5)(A).[1] If no controversy exists over the distribution, the Tribunal "shall * * * distribute such fees to the copyright owners entitled [to receive the awards]." 17 U.S.C. 111(d)(5)(B). If a controversy does exist, the Tribunal "conduct[s] a proceeding to determine the distribution of royalty fees" (*ibid.*); "[d]uring the pendency" of that proceeding, the Tribunal "shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy" (17 U.S.C. 111(d)(5)(C)).

2. This consolidated proceeding in the court of appeals concerned the Tribunal's awards for 1979, 1980, and 1982. The royalty fund for 1982, which was the largest of the three

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[1]Section 111(d)(5)(A) provides in pertinent part:

> Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

years at issue, amounted to $45 million (Pet. 13). The Copyright Royalty Tribunal awarded 1% of the fund for 1982 to petitioner and two other claimants who produce religious programs (Pet. App. 34a).[2] This represented an increase from the Tribunal's award of .35% to these claimants for the years 1979 and 1980 (*id.* at 10a, 20a). The court of appeals upheld the 1% award to the religious claimants for 1982, rejecting petitioner's argument that the Tribunal's procedure for the distribution of the fund was invalid (*id.* at 35a-36a). In addition, the court of appeals found no evidence to support petitioner's claim that the Tribunal's decisions were based on an unconstitutional hostility toward religious broadcasting (*id.* at 37a).

3. Petitioner renews its attack on the Tribunal's method of determining the distribution of the royalty fund for 1982.[3] Petitioner fails to make clear, however, which of two distinct parts of the procedure it is challenging. Nevertheless, whichever aspect is in question, petitioner's argument is without merit, and further review would be unwarranted.

a. In the 1982 proceeding, all claimants except the religious programmers and one other reached an agreement as to the distribution of the royalty fund. The total claims of the nonsettling parties constituted less than 10% of the fund. Accordingly, the Tribunal distributed 90% of the fund

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[2]In the proceedings below, the three religious programmers were designated as the Devotional Claimants (Pet. App. 9a-10a n.4). Petitioner is the only one of this group to seek further review. However, the other two Devotional Claimants, the Old Time Gospel Hour and PTL Television Network, have submitted a brief as respondents in support of petitioner.

[3]Petitioner does not contest the court of appeals' ruling that substantial evidence supports the Tribunal's determination of a 1% award to petitioner (Pet. App. 29a, 34a-35a). Likewise, petitioner does not seek review of the part of the court's decision that rejected its statutory challenges to the Tribunal's awards for 1979 and 1980 (*id.* at 9a-29a).

to the settling claimants in accordance with their agreement, and it conducted a proceeding to determine the entitlement to the remaining 10%. Pet. App. 35a. Petitioner may be challenging the 90% distribution to the settling claimants prior to the final resolution of the controverted portion of the fund. Any such contention is foreclosed, however, by the text and policies of the Copyright Act.

17 U.S.C. 111(d)(5)(C) expressly provides that "[d]uring the pendency" of a proceeding to resolve a controversy concerning the distribution of the royalty fund, the Tribunal "shall withhold from distribution" the amount that is disputed "but *shall have discretion to proceed to distribute any amounts that are not in controversy*" (emphasis added). Here, the Tribunal set aside 10% of the fund as the total amount that the nonsettling claimants were requesting, and it distributed to the settling claimants the 90% of the fund that was not in controversy. This procedure was explicitly authorized by the Act. See *ACEMLA* v. *Copyright Royalty Tribunal*, 763 F.2d 101, 108 (2d Cir. 1985).

As the court below recognized (Pet. App. 8a, 36a), the Act encourages the parties to settle their claims to royalties. However, it "would effectively eliminate the likelihood for settlements if [a court] accepted [petitioner's] contention that when one claimant—no matter how modest that claimant's likely share under even the most sanguine view—chooses not to settle with the other claimants, all awards would thereby be in controversy and a full hearing on all claims would be required" (*ibid.*). The voluntary settlement of these complicated disputes is an important part of the statutory scheme and is inconsistent with the "litigation-to-the-hilt" approach (*id.* at 38a) of royalty fund claimants that the court of appeals decried (*id.* at 37a-38a). The prompt distribution of the "90% of the fund" that was "never claimed [by the nonsettling parties]" (*id.* at 36a) is fully consistent with the congressional purpose of encouraging settlements.

b. Petitioner may also be challenging the Tribunal's ultimate distribution of the contested 10% of the royalty fund. The Tribunal determined that petitioner and the other two religious programmers had established a 1% entitlement to the fund, that another party was also entitled to a 1% award, and that the remainder would be distributed to the settling claimants in accordance with their agreement. Petitioner appears to be arguing that the Tribunal erred in distributing this portion of the royalty fund to the settling claimants without requiring them to prove their claims. However, for the reasons previously discussed, any such contention is contrary to the statutory objective of encouraging voluntary resolution of these disputes by allowing parties to agree to the apportionment of "any part of the fund not in controversy" (Pet. App. 36a). As the Tribunal explained, the voluntary agreement of the other parties meant that "the only controversy to be determined by the Tribunal was what award, if any, to make to [petitioner]." 49 Fed. Reg. 37653 (1984); App., *infra*, 2a.[4]

In any event, contrary to the central premise of petitioner's argument, the Tribunal did have evidence of the claims of the settling parties. In this case, the settling claimants introduced the records of the earlier Tribunal proceedings for the years 1978-1981 and agreed to accept the same proportionate shares for 1982 that they were to be awarded for 1979 and 1980 (which proceedings were then in progress following remand from the court of appeals (see Pet. App. 41a-87a)). See 49 Fed. Reg. 37653-37654 (1984); App., *infra*, 1a, 2a. The Tribunal specifically rejected petitioner's contention "that the record of the 1982 proceeding 'is

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[4]The relevant portion of the Tribunal's 1982 decision has been omitted from the appendix to the petition (the appendix skips from Pet. App. 88a to 91a). For the convenience of the Court, we have reprinted the omitted material from 49 Fed. Reg. 37653-37654 (1984) in an appendix to this memorandum.

devoid of any evidence upon which to base an award to [the settling claimants]' " and "that other parties 'have only put in rebuttal and surrebuttal evidence against' [petitioner]" (*id.* at 2a). Rather, it noted that "20,194 transcript pages of prior distribution proceedings" were "incorporated into the 1982 record"[5] and that petitioner "made no showing that the collective situation of the other [claimants] change[d] in 1982" (*id.* at 3a).

For this reason, the decision below does not, as petitioner asserts, conflict with the decision of the Second Circuit in *ACEMLA* v. *Copyright Royalty Tribunal, supra*. There, the court set aside a Tribunal award to settling claimants who had made no showing of their right to the amount in controversy (763 F.2d at 109). Whatever the correctness of the Second Circuit's decision, it is not in conflict with the decision in this case, since the settling claimants here did adduce proof of their claims.[6]

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[5]Petitioner did not object to the admission of this material. See 1982 Tr. 5-6.

[6]We also note that *ACEMLA* involved the distribution of jukebox rather than cable royalties and therefore arose under 17 U.S.C. 116. Section 116(c)(4)(B), upon which the Second Circuit specifically relied (763 F.2d at 104, 108-109), provides that the "fees to be distributed shall be divided * * * in such pro rata shares as [the performing rights societies] shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share *to which such performing rights societies prove entitlement*" (emphasis added). No comparable provision is contained in Section 111 governing cable copyright awards.

Respondents supporting the petitioner (see page 3 note 2, *supra*) argue that the Acting Chairman of the Copyright Royalty Tribunal conceded in testimony to a congressional subcommittee that the decision below conflicts with *ACEMLA*. However, that testimony—which preceded the decision in this case—simply noted that, because of the possibility that a legal issue could arise in more than one circuit, the Tribunal might be "faced with a potential split" of authority; for that reason, the Tribunal recommended that Congress amend the Copyright Act to provide for exclusive review in the District of Columbia Circuit.

4. Also without merit is petitioner's assertion that the Tribunal's decisions were based on religious discrimination and that the court of appeals failed to give adequate consideration to this issue. The court of appeals specifically addressed petitioner's argument and expressly found "no evidence to support the proposition that [petitioner] was not awarded its 'fair share' of copyright royalties, * * * much less that this alleged shortfall resulted from anti-sectarian sentiments harbored by the Tribunal" (Pet. App. 37a); indeed, as the court noted (*ibid.*), the 1982 award represented an approximately three-fold increase in petitioner's share over prior years, which is "scarcely suggestive of hostility to [petitioner]." There is no reason for this Court to review the court of appeals' fact-bound conclusion that it could "find no evidence" to support petitioner's allegation of bias (*ibid.*).[7] Petitioner's aspersions upon the adequacy of the court of appeals' review are unfounded and clearly belied by the court's careful and extensive consideration of the issues in this and the prior related cases.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986

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[7]Petitioner particularly complains about the Tribunal's reference to a scriptural passage. But as its context makes clear, this isolated portion of the Tribunal's opinion was in response to the court of appeals' earlier criticism of the Tribunal's previous award decision; as the court correctly understood, it does not constitute evidence of religious discrimination against petitioner. Cf. *ACEMLA*, 763 F.2d at 103 & n.*.

APPENDIX

The appendix to the petition (see Pet. App. 88a-91a) omits the following portion of the decision of the Copyright Royalty Tribunal concerning the distribution of fees for 1982 (49 Fed. Reg. 37653-37654 (1984)):

> royalty fees for the period January through December 31, 1982.
>
> **Background and Chronology**
>
> On May 6, 1983, the Motion Picture Association of America, the Joint Sports Claimants, the Public Broadcasting Service, the Music Claimants and National Public Radio (the "Settling Parties") filed with the Tribunal an agreement in which they agreed to seek in the 1982 distribution proceeding a single aggregate award which would be divided among them "in the proportions determined by their individual Phase I awards in the 1979 and 1980 distribution proceedings (with the proviso that NPR's share shall not be reduced below 0.25 percent of the total funds)." Subsequently the National Association of Broadcasters and the Canadian Claimants agreed to resolve the Phase I proceeding on the basis of the Tribunal's 1979 and 1980 awards. These agreements contemplated that any award to the Devotional Claimants in this proceeding should be accomplished by a pro rata reduction of the shares of other parties.
>
> As in prior distribution cases, the Tribunal conducted the proceedings in two phases. In Phase I the Tribunal receives evidence concerning the awards to general categories of claimants, while in Phase II it receives evidence concerning disputes within categories. The Tribunal held evidentiary hearings on Phase I and Phase II issues, including rebuttal cases, on July 17, 18, 24, 25, 26 and August 2, 3, 6, 7.

The Tribunal directed parties to submit proposed findings of fact and conclusions of law on August 22, 1984. Reply findings were received on August 31, 1984.

The Tribunal incorporated the Phase I and Phase II records of the 1978, 1979, 1980, and 1981 cable distribution proceedings into the record of the 1982 proceeding.

On September 6, 1984, the Tribunal granted the motion of the Turner Broadcasting System, Inc. to intervene in the Phase II proceeding.

Phase I

Structure of Phase I Cases

We begin with the argument advanced by the Devotional Claimants[1] that the record of the 1982 proceeding "is devoid of any evidence upon which to base an award to any claimant group other than PBS and the Devotional Claimants." The Devotional Claimants assert that other parties "have only put in rebuttal and surrebuttal evidence against the Devotional Claimants." Devotional Claimants conclude therefore that no award can legally be made to these parties.

We find no merit in the argument of the Devotional Claimants, which in our view reflects a myopic view of the matters to be determined by the Tribunal in this Phase I proceeding. All Phase I parties, other than Devotional, in a series of voluntary agreements determined the Phase I awards. Since these agreements did not include the Devotional Claimants, the only controversy to be determined by the Tribunal was what award, if any, to make to the Devotional Claimants.

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[1]Devotional Claimant's Proposed Findings of Fact and Conclusions of Law, pp 37-39.

We also reject the argument that the 1982 Phase I record provides no basis for an award to most other categories of claimants. The Tribunal incorporated into the 1982 record 20,194 transcript pages of prior distribution proceedings. Devotional Claimants made no showing that the collective situation of the other Phase I parties changes in 1982.

NO. 85-926

Supreme Court, U.S.
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IN THE

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THE CHRISTIAN BROADCASTING NEWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
MOTION PICTURE ASSOCIATION AMERICA, INC., *ET AL.*
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC., *ET AL.*, IN OPPOSITION TO PETITION

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MOTION PICTURE ASSOCIATION AMERICA, INC., *ET AL.*
Respondents.

BRIEF OF RESPONDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC., *ET AL.*, IN OPPOSITION TO PETITION

The Respondent, Motion Picture Association of America, Inc., *et al.* (Program Suppliers),[1] opposes the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Curcuit filed by Petitioner, The Christian Broadcasting Network, Inc. (CBN).

STATEMENT OF FACTS

The Copyright Revision Act of 1976, 17 U.S.C. §101 *et seq.*, grants cable systems a compulsory license to retransmit the copyrighted works broadcast by television stations. 17 U.S.C. §111(c). In return for this privilege,

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[1] Program Suppliers were a Petitioner and Intervenor in the several cases decided by the court below. Appendix A to Petition 5a and 6a (hereinafter cited as "Pet. App._____."). National Public Radio, also a Petitioner and Intervenor below, joins in this opposition.

cable systems file statements of account and pay royalty fees based upon the amount of nonnetwork programming retransmitted by the cable system from "distant" television stations. 17 U.S.C. §§111(d)(2)(A) and (B). The royalty fees collected are distributed by the Copyright Royalty Tribunal (Tribunal). 17 U.S.C. §§111(d)(5) and 801–810. Distribution of the royalty fees is made to claimants for a wide range of works on television and radio stations retransmitted by cable systems. The first royalty distribution proceeding related to royalties collected for 1978, and proceedings have been held for each yearly fund since then.[2] *See generally*, Pet. App. 47a–51a (Description of the Tribunal's procedures and the claimants.).

Congress did not specify guidelines for distributing royalites, but gave the Tribunal discretion to distribute based upon "all pertinent data and considerations presented by the claimants." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 97 (1976). The Tribunal established three primary criteria — harm, benefit, and marketplace value — and two secondary criteria — time and quality — as beacons by which distribution would be guided. Pet. App. 53a–55a. Claimants have offered differing theories and support as to how the royalty funds should be distributed. All evidence has been evaluated in terms of the criteria, with particular emphasis on the marketplace value standard. *Id.*

Although the size of the royalty fund increases each year as the cable industry grows, the Tribunal's task remains the same: to make a relative distribution among claimants. That is, the Tribunal's allocations are expressed in percentage terms adding to one hundred percent. Pet. App. 51a. This task, coupled with the lack of express statutory standards, requires the exercise of judgment and discretion, not precise pinpointing. This, in turn, leads to

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[2] With the exception of the 1981 royalty fund as to which all claimants reached agreement.

considerable second-guessing by claimants, and to appeals from each of the distribution decisions.

For example, the instant petition involves the 1979, 1980, and 1982 distribution determinations. Petition For Writ at 1. The 1979 determination has been the subject of two separate decisions by the Tribunal and two separate decisions by the Court of Appeals. Pet. App. 7a-8a. The original 1980 decision was vacated and remanded summarily by the Court of Appeals, Pet. App. 39a-40a, and after being rewritten was the subject of a full opinion by the Court of Appeals. Pet. App. 20a *et seq.* Only the 1982 proceeding, in which all parties (but petitioner) resolved royalty distribution among themselves by settlement, Pet. App. 89a, has not been subject already to more than one trip through the appellate process. The consistent result of these several reviews has been an affirmance of the Tribunal's "inherently subjective judgment calls and rough balancing of hotly competing claims" based upon "the broad discretion necessarily conferred upon the Copyright Royalty Tribunal in making its distributions." Pet App. 37a-38a. Not content with the overlay of review already weighing on these determinations, petitioner now seeks yet further delay and confusion to these same matters.[3]

REASONS FOR DENYING THE WRIT

I. The Alleged Conflict Rests Upon Elementary Statutory And Factual Distinctions Between The Matters

Petitioner claims conflict (Petition 9-10) between courts

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[3]The proceedings involving the 1983 royalty distribution are currently in progress. The Petition for Writ has the effect of keeping the conclusions of the earlier decisions open — at least as they relate to Petitioner — and thus providing a measure of uncertainty as to their precedential value in the 1983 decision. This effect may be of more importance to Petitioner than the remote possibility that this Court would grant the petition.

of appeals' decisions interpreting two unrelated provisions of the 1976 Revision Act. One decision interprets 17 U.S.C. §116 relating to jukebox royalties, while the decision below interprets 17 U.S.C. §111 relating to cable television royalties. These sections dealing with different substantive areas have different statutory language.

A. There Is No Conflict On The Same Matter

Under Rule 17.1(a) of this Court's Rules, consideration may be given to whether decisions of courts of appeals conflict "on the same matter" in judging whether to grant a writ. To be the same, the courts must address the same statutory provision or regulation. *See e.g., Bingler* v. *Johnson*, 394 U.S. 741, 747 (1969) (Same matter related to one subsection of regulations.). Petitioner would, however, have this Court consider a purported conflict where separate sections of the 1976 Revision Act were addressed.

The case below dealt with 17 U.S.C. §111, and the purported case in conflict, *Acemla* v. *Copyright Royalty Tribunal*, 763 F.2d 101 (2nd Cir. 1985), dealt with 17 U.S.C. §116. These two sections differ substantially in their statutory requirements for distribution. *Compare* 17 U.S.C. §111(d)(5)(A) *with* 17 U.S.C. §116(c)(2). Section 116 contains a provision, 17 U.S.C. §116(c)(4), which divides claimants into specific categories for distribution purposes. This statutory directive, without parallel in Section 111[4], mandates distribution to individual copyright owners and to performing rights societies in a particular order and in a particular manner. *Id.* This was the linchpin of the Second Circuit's analysis of the partial settlement before it. *Acemla*, *supra*, 763 F.2d, 108-09.

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[4] To be sure, the music performing rights societies are claimants to the cable royalty distribution proceedings. Pet. App. 48a. No distinction is made, however, between them and other cable royalty claimants for purposes of distributing cable royalties.

In directing how funds are to be divided performing rights societies, Section 116(c)(4)(B) requires either complete agreement among claimants or proof of each individual claim:

> (4) The fees to be distributed shall be divided as follows: ... (b) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

To the contrary, Section 111(d)(5)(A) specifically permits partial settlements:

> ... (A) ... Notwithstanding any provisions of the antitrust laws, for purposes of this clause any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

The statutory differences preclude a finding that the two cases address the same matter.

B. No Important Federal Question Is Presented

The petition does not raise a special and important issue of federal law. (Petition 10–12.) Petitioner's contention that the court below "cavalierly dismissed the explicit requirements for a fair hearing in Section 111 of the Copyright Act because of a policy preference for settlements" (Petition at 11)[5] is demonstrably false.

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[5]Of course, the statute, 17 U.S.C. § 111(d)(5)(A), expresses a policy preference for settlements.

Neither the Tribunal nor the court dispensed with the hearing requirements. The settling parties participated fully in the Tribunal hearing. The settlements had obviated a controversy among these parties, leaving "the only controversy to be determined ... [to be] what award to make, if any, to make to [petitioner]." Pet. App. 90a. The Tribunal "incorporated into the record 20,194 pages of prior distribution proceedings." *Id.* The Tribunal had previously included a "changed circumstances" analytical factor to consider whether circumstances changed enough from year to year to warrant different awards. Pet. App. 21a–22a and 106a–107a. The weight of the prior evidence and the lack of a showing "that the collective situation of the [settling parties] changed in 1982" (Pet. App. 90a) justified granting an award to the settling parties.

As the court below found, this procedure comports with common sense and encourages settlement. Petitioner's alternative requiring proof by all parties absent a total settlement would guarantee a full-blown hearing each year. Pet. App. 36a. Limiting hearing issues to those in controversy provided petitioner with a full hearing, and gave the advantages of settlement to those who settled. Relying on past record evidence in an ongoing process where circumstances had not changed is also appropriate.

Petitioner was given full rights to present evidence, to cross examine, and to submit findings and conclusions. Rather than any lack of due process, the procedures demonstrate both flexibility and responsiveness to the settlement and to developing a full record on the disputed issues. This Court need not and should not exercise its plenary review powers to reexamine the Tribunal's procedure in these circumstances.

II. No Religious Discrimination Can Be Found In The Tribunal's Decision

Petitioner's argument (Petition 14–17) seeking review to

purge claimed religious bias rests upon a Tribunal decision that was vacated upon petitioner's motion. Pet. App. 39a–40a. Petitioner, not satisfied that the challenged decision was rendered null and void, would have this Court investigate the Tribunal's decision-making for possible, albeit unstated and otherwise not apparent, bias. Such investigations are well beyond the review process, absent compelling reasons to look behind an agency's written decision. Furthermore, none of the Tribunal's decisions shows any evidence of unconstitutional motivation (Petition 17).

The vacated decision discusses substantive distinctions related to the established distribution criteria, not religious bias. Petitioner sought a comparison between it and PBS because PBS received a higher award (Pet. App. 51a):

> It has been urged that our award to PBS compels us to make [the] same award to the devotional claimants. The devotional claimants argue that both are noncommercial and that both seek financial support from the public. We find no real similarity. The devotional claimants conduct a Christian ministry.

1980 Cable Royalty Distribution Determination, 48 Fed. Reg. 9552, 9568 (1983) (Petitioner quotes the continuation of this discussion at 14–15 of the Petition.).

The Tribunal found, however, "no real similarity" because petitioner's programs appeal to a limited audience, while PBS's entire programming "presents a wide range" appealing to different audiences. This difference is factored under the benefit and marketplace value criteria. Comparison of financial support likewise did not show a similarity. Petitioner's support comes from its limited audience and, as developed in the record, may be related to other aspects of its "ministry." In contrast, PBS obtains contributions from a broadly based coalition whose

support goes to programming, PBS's only mandate. This issue relates to whether the marketplace value of programs can be inferred from the amount of contributions. Contributions intended to support other aspects of petitioner's "ministry" do not show program value and are thus of no use in distribution.

The Tribunal addressed the very points of comparison urged by petitioner within the distribution criteria. Even assuming this decision had not been vacated, there are no grounds for petitioner's contention.

Because the decision was vacated shortly after issuance, this situation is not similar to cases relied upon by petitioner (Petition 17) where courts were seeking to reverse decades-old discriminatory practices. Nothing suggests the type of ingrained and systematic hostility and discrimination found in the school desegregation cases was possible, let alone practiced, in the area of royalty distribution between the 1978 proceeding (the initial distribution) and the challenged 1980 proceeding. The absence of bias was confirmed by the court of appeals' findings that the decision "contains no language indicating any hostility toward the Devotional Claimants;" that petitioner was awarded its "fair share" of the 1980 royalties; and that there were no "anti-sectarian sentiments harbored by the Tribunal." Pet. App. 37a.

Petitioner's award in the original appeal of the 1979 distribution decision (Pet. App. 41a *et seq.*) was reviewed "with particular care." Pet. App. 56a. The court again "scrutinized carefully" (Pet. App. 56a and 19a) the second appeal concerning petitioner's award in the 1979 and 1980

decisions,[6] addressing both the record support for the numerical award in 1979 and 1980 distributions, Pet. App. 10a–18a, and the several arguments raised by Petitioner regarding its 1982 award, *id.* 34a–37a.

After its comprehensive review, the court found no evidence of "an unconstitutional hostility" toward petitioner, substantial evidence to support the awards made, and concluded that the three-fold increase in the 1982 award was "scarcely suggestive of hostility" toward petitioner. Pet. App. 37a. In sum, it is impossible to imagine this Court requiring a reviewing court to undertake a more detailed analysis of an agency action, or this Court finding (after yet more investigation) any bias toward petitioner.

---

[6]Contrary to Petitioner's claim (Petition at 16), the court below expressly found Petitioner's award "fell comfortably within" the zone of reasonableness. Pet. App. 18a. While the court reminded the Tribunal that "short-hand and toss-away, conclusory sentences" are generally inadequate (*id.* n. 10), this did not detract from the ruling that the award was in the zone of reasonableness.

CONCLUSION

For the reasons stated, the Petition for Writ should be denied.

Respectfully submitted,

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THE CHRISTIAN BROADCASTING NETWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF FOR RESPONDENTS IN SUPPORT OF PETITIONER OUT OF TIME AND BRIEF FOR RESPONDENTS OLD-TIME GOSPEL HOUR AND PTL TELEVISION NETWORK IN SUPPORT

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and PTL Television Network

January 27, 1986

ALPHA GRAPHICS, INC. • WASHINGTON, D.C. • (202) 331-8101

No. 85-926

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE CHRISTIAN BROADCASTING NEWORK, INC.,
Petitioner,

v.

COPYRIGHT ROYALTY TRIBUNAL,
MOTION PICTURE ASSOCIATION AMERICA, INC., *ET AL.*
Respondents.

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Respondents Old-Time Gospel Hour (Old-Time) and PTL Television Network (PTL) herewith move for leave to file the attached brief in support of issuance of a writ of certiorari out of time. On December 19, 1985 at the request of two respondents (albeit in opposition) this Court extended the "time within which to file a response to the petition for a Writ of Certiorari ... to and including January 27, 1986, *for all respondents.*" (Emphasis added.) Respondents Old-Time and PTL interpreted that extenstion to embrace them. On advice of the Office of the Clerk that such was not the intent of the extension, Old-Time and PTL herewith request their inclusion in the foregoing extenstion.

On January 21, 1986, a copy of the manuscript of the Brief in Support was served on all other respondents, either by hand or by overnight mail. Thus, any parties who might oppose the Petition have been apprised of the text of Old-Time's and PTL's brief and therefore can in no way be

prejudiced should they wish to address its substance.

Respectfully submitted,

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QUESTIONS PRESENTED

The questions presented for review are as set forth by Petitioner, The Christian Broadcasting Network, Inc. (CBN).

LIST OF PARTIES

The list of parties in the consolidated cases below, Nos. 84-1230 *et al.* and 84-1519 *et al.* is as set forth by CBN.

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Respondents Old-Time Gospel Hour (Old-Time) and PTL Television Network (PTL)[1] herewith support the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by The Christian Broadcasting Network, Inc. (CBN), seeking review of the Opinion and Order filed August 20, 1985 jointly in *National Association of Broadcasters* v. *Copyright Royalty Tribunal*, D.C. Cir. Nos. 84-1230 *et al.* and in *The Christian Broadcasting Network, Inc.* v. *Copyright Royalty Tribunal*, D.C. Cir. Nos. 84-1519 *et al.*,

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[1] Formally incorporated as Heritage Village Church and Missionary Fellowship, Inc.

affirming the final determinations of the Copyright Royalty Tribunal (CRT or Tribunal) as to distributions of copyright royalties for cable television retransmission of copyrighted works for the years 1979, 1980 and 1982.

Respondents' brief in support of petitioner is submitted pursuant to Rule 19.6 of this Court.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

The opinions below, jurisdiction, statutes involved and statement of the case are as set forth by CBN.

REASONS FOR GRANTING THE WRIT

Old-Time and PTL concur with CBN's stated reasons for granting the writ, particularly with respect to the split between the Circuits. Indeed, those reasons are enhanced by focusing attention on the testimony of the Tribunal's then Acting Chairman in hearings on Copyright Royalty Tribunal Reform before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice. That testimony followed the Second Circuit's decision in *Acemla* v. *Copyright Royalty Tribunal*, 763 F.2d 101 (2d Cir. 1985). There it was decided that the Tribunal erred in permitting ASCAP and BMI, on the mere strength of an agreement and without presenting a case, to reap the spoils of all juke box royalties to which entitlement was not otherwise proven by a non-agreeing claimant. Hoping the District of Columbia Circuit would not follow suit, the Acting Chairman correctly predicted a split between it and the Second Circuit on the first issue advanced by CBN, *i.e.*, whether the Tribunal has authority to allocate royalty funds to claimants who have not proved their entitlement. Interestingly the Acting Chairman's solution to the impending conflicting decisions between the Circuits is to abolish judicial review in any Circuit but the District of

Columbia Circuit. The Tribunal's position is:

> *Judicial Review*. The Tribunal is currently faced with a potential split with the Second Circuit and the D.C. Circuit Courts of Appeals. The Second Circuit has recently decided a case involving the burden of proof of settling parties versus non-settling parties. The D.C. Circuit has a similar issue pending in another distribution proceeding. The Tribunal recommends that the Copyright Act be amended to allow that no court other than the United States Court of Appeals for the District of Columbia [Circuit] shall have jurisdiction to review a final decision of the Copyright Royalty Tribunal.[2]

As CBN points out, "The result reached below is in direct conflict with the Decision reached three months earlier by the Second Circuit in *Acemla* ..." *supra*. Legislative reform of the Copyright Royalty Tribunal is stalled, and there is no reason to suppose that the Tribunal's wish will come true. A split in the Circuits will remain, and absent unexpected Congressional action it can be presumed that appeals will be filed at Circuits other than the District of Columbia. Cable television royalty distributions are an annual event, now about $100 million each. So far there has never been a universal settlement among the claimants.[3] The matter of the "burden of proof of settling parties versus non-settling parties" is very likely to arise again in future years' litigation, especially inasmuch as heretofore the non-settling parties have not

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[2] Hearings on Copyright Royalty Tribunal Reform before the House Subcom. on Courts, Civil Lib. and Admin. of Justice, 99th Cong., 1st Sess. (Testimony of The Honorable Edward W. Ray, July 11, 1985 at p. 8) (Unpublished).

[3] Other than an agreement as to one year to accept the same percentage as finally awarded in another year.

On remand, based upon the earlier records (for the years 1979 and 1980), the Tribunal allocated 0.35% to these parties. With respect to the subsequent year (1982), based upon a new and expanded hearing record, the Tribunal increased that allocation three-fold to a full 1%. The texts of the Tribunal's decisions on remand and in the 1982 proceeding reflect no hint of any bias against religious programs.

The court of appeals, which had been responsible for the earlier remand, gave these Tribunal decisions a searching review and, without dissent, affirmed the Tribunal. With regard to the contrasting cases in the record for public television and the religious program producers, the court stated:

> We also indicated in our prior decision that the Tribunal had failed to provide an adequate justification for treating the Devotionals' claims in a manner different from that accorded the claim of PBS. *Id.* On remand, the CRT elaborated on its reasons for this difference in treatment:
>
> > The Devotional Claimants present only a single program while public broadcasting offers a range of programs, that in its diversity attracts a broad range of audience. The carriage of the public broadcasting signals indicates the appeal of their programing [sic]. Devotional programmming [sic] is but a small portion of a distant signal. Therefore, the carriage of that signal does not establish the appeal of devotional programming.

> 49 Fed. Reg. 20,050, J.A. at 2211. That is to say, inasmuch as a PBS station carries only PBS programming, the Tribunal concluded that a cable operator's decision to carry a PBS station reflects a judgment that PBS programming is of value. On the other hand, the decision to carry a station that carries one or more programs of the Devotional Claimants does not necessarily represent a determination by the cable operator that it was the devotional portion of that station's programming which was deemed valuable. Since the vast majority of that station's programming would be non-devotional, the Tribunal could reasonably conclude that it is more likely that the station was being carried by the cable operator because of its other, nondevotional shows. [fn. omitted]

Appendix to Petition at 12a-13a.

III

Petitioner has failed to provide the Court with the requisite "special and important reasons" to grant certiorari. SUP. CT. R. 17.1. It is clear that petitioner has not presented the Court with an important question of constitutional law which has not been, but should be, settled by this Court. *Id.* As demonstrated in the foregoing sections, petitioner's argument that the Tribunal's treatment of the public television claimants and the religious program claimants reflects anti-religious bias is without merit. Contrary to petitioner's characterizations of the lower court's decisions on review, the court *did* subject the Tribunal's actions to full and strict scrutiny. Indeed the court

remanded to the Tribunal the initial zero award because of concerns as to the adequacy of the Tribunal's reasoning.

In response to that remand the Tribunal removed any vestiges of the allegedly discriminatory "taint", both in the language employed in the Tribunal's decision and in its action—awarding the devotional claimants a portion of the royalties. On appeal, the court found that the Tribunal had acted rationally and reasonably in its treatment of the devotional claimants and had adequately explained its different treatment of PBS and those claimants. The court also specifically addressed petitioner's claims of religious bias and found them unsupported by the record. Nothing in this Court's decisions requires more.

The cases cited by the petitioner do not support its position. They involved factual situations in which there was governmental action affirmatively supporting religious views, *Epperson v. Arkansas*, 393 U.S. 97 (1968), or which burdened the exercise of religious or other First Amendment rights. *Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707 (1981); *Grosjean v. American Press Co., Inc.*, 297 U.S. 233 (1936).[4] No such governmental involvement or

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[4]Petitioner's reliance on *Swann v. Mecklenberg Board of Education*, 402 U.S. 1 (1971); *Green v. County School Board of New Kent County, Virginia*, 391 U.S. 430 (1968) is misplaced. Those cases involved detailed findings based on extensive trials of intentional, prolonged discriminatory activity by governmental officials. Here, petitioner is basing its claim of bias on two

interference with the exercise of religious activity is involved here. The court of appeals found that the Tribunal had used the same criteria to value petitioner's claims to the copyright royalties as it had used with respect to other claimants and that there was no evidence in the record to support petitioner's claim of anti-sectarian bias. The First Amendment does not require or permit more. *See Roemar v. Board of Public Works of Maryland*, 426 U.S. 736, 746-747 (1976); *King's Garden, Inc. v. FCC*, 498 F. 2d 51, *cert. denied*, 419 U.S. 996 (1974).

CONCLUSION

The petitioner has failed to establish the requisite "special and important reasons" which would justify grant of writ of certiorari. SUP. CT. R. 17. 1. (c). The petitioner has made no case that there has been any violation of applicable precedent of this Court or that the decision below otherwise warrants this Court's consideration.

Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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isolated phrases in the Tribunal's decisions, and an initial absence of award that was subsequently increased to a major level of award for three individual program producers.

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January 27, 1986

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[3] Other than an agreement as to one year to accept the same percentage as finally awarded in another year.

occupied that position by choice but, instead, only in the face of unreasonable settlement offers.

As is set forth in the seminal treatise by Messrs. Stern and Gressman, certiorari jurisdiction has as one of its major purposes uniformity of decisions among federal courts of appeals, "hence a square and irreconcilable conflict of this nature *ordinarily* will be enough to secure review." R. Stern and E. Gressman, *Supreme Court Practice*, 265 (5th ed. 1978). Cited in support are *Avco Corp.* v. *Aero Lodge 735*, 390 U.S. 557, 559 (1968) where this Court stated "[w]e granted the petition for certiorari . . . because of an apparent conflict between the decision below [by the Sixth Circuit] and [one] from the Court of Appeals for the Third Circuit." Also cited is *Northeastern Pennsylvania National Bank* v. *United States*, 387 U.S. 213, 217 (1967) where it was stated that "[b]ecause of an acknowledged conflict between . . ." the Third and Seventh Circuits "we granted certiorari." Clearly we have here an acknowledged direct conflict between the Circuits, the acknowledgment coming from no less than the Tribunal itself.

CONCLUSION

For the reasons set forth above and by CBN the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 27, 1986

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served three copies of the foregoing Respondent's Motion for Leave to file Brief in Support, out of time, and Brief in Support of the Petition for Writ of Certiorari upon the persons indicated below by depositing same in the United States mail, first class postage prepaid, addressed to the following:

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